(24,742)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 475.

PHILADELPHIA & READING RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

ROBERT J. McKIBBEN.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 United States District Court for the Southern District of New York.

L. 13, 107.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 27th day of August in the year one thousand nine hundred and fourteen.

[SEAL.] ALEX. GILCHRIST, JR., *Clerk.*

JOSEPH A. SHAY,
Plaintiff's Attorney.

Office and Post Office Address 50 Broad Street, Borough of Manhattan, New York City.

2 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Complaint.

Plaintiff complains of the defendant and alleges:

I. That at all the times hereinafter mentioned, the defendant was and still is a resident and citizen of the State of Pennsylvania, and is a corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and was engaged in interstate commerce, and operated a steam railroad in and through the States of Pennsylvania and New Jersey, and in connection with its business said defendant owns, maintains and controls certain freight yards, located in Port Reading, State of New Jersey, known as the Port Reading Yards.

II. That plaintiff is a resident and citizen of the State of New York, and of the Southern District.

III. That at all the times hereinafter mentioned, plaintiff was

in the employ of defendant as brakeman of freight cars of said defendant, at its said yards in Port Reading, New Jersey, and at the time he received his injuries, hereinafter complained of, he was engaged in interstate commerce work, and was aiding in interstate commerce.

IV. That at all the times hereinafter mentioned, and on February 18th, 1913, in the aforesaid yards of said defendant at Port Reading, New Jersey, the defendant and its agents, servants and employees, so negligently and carelessly conducted themselves toward this plaintiff, that while he was engaged in the performance of his duty as brakeman, in an effort to uncouple two certain
3 cars of a certain freight train of cars, that they caused and permitted the train of freight cars to collide with his body, by reason of which he received serious, painful and permanent injuries to his body, especially to his right arm and left leg which were amputated, and he was otherwise painfully and permanently injured, and he suffered a serious shock to his nervous system, and has been rendered a cripple for life, by reason of which he has lost and will lose his wages at his usual occupation as brakeman, and has spent and will spend sums of money for medical and personal attendance for life.

V. Plaintiff received his injuries without any negligence on his part, in anywise contributing thereto, but solely by reason of the negligence and carelessness of the defendant, its agents, servants and employees, and of the person in its service who was in charge of the locomotive attached to the said train of cars, in failing to stop the train when plaintiff was in the act of making the cut, and by reason of the negligence and carelessness of the persons in charge of signalling and in control of the train, and in failing, to inspect, make safe and keep safe a certain coupling upon one of the cars in said train, and in failing to provide said car with a safe and workable coupling, in failing to warn the plaintiff of the condition of the said coupling, and in failing to comply with the Safety Appliance Act, as provided by the Act of March 2nd, 1893, 27 Statute, 531, Chapter 196, and the Act of March 2nd, 1903, 32 Statute, 943, Chapter 976 and such other Acts appertaining to couplers on cars, and in failing to furnish plaintiff with a reasonably safe place to work, and in failing to inspect, make safe and keep safe the road bed where plaintiff was required to work, and in failing to have a guard rail at or near Switch 11, Lower Pit provided with a block to prevent his foot from being caught, by reason of all of which, while plaintiff was in the performance of his duties, at-
4 tempting to uncouple one of the interstate cars of a train of freight cars, going in an easterly direction, and being backed up for the purpose of being cut off from the balance of the train by pulling the cutting lever, said coupler did not open and plaintiff was obliged to go between the slowly moving cars, by raising the pin on the end cars with his hand and while attempting to step out, the cars having continued to move, defendant's engineer having negligently and carelessly failed to bring the train to a standstill, his foot was caught in the guardrail, and amputated, he was

dragged for a considerable distance, and the train was again permitted to come into collision with the car that had been severed from the train, by reason of which his right arm was caught between the two couplers, as a result of which it was amputated, and by reason of the negligence and carelessness of said defendant and its said employees, plaintiff has been damaged in the sum of One hundred and fifty thousand ($150,000) Dollars.

Wherefore plaintiff demands judgment against the defendant, for the sum of $150,000 together with the costs and disbursements of this action.

JOSEPH A. SHAY,
Attorney for Plaintiff,
50 *Broad Street, Boro. of Manhattan, N. Y.*

5 STATE OF NEW YORK, COUNTY OF NEW YORK,
City of New York, Borough of Manhattan, ss:

Robert J. McKibben being duly sworn, deposes and says: That he is the plaintiff in the within entitled action, that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ROBERT J. McKIBBIN.

Sworn to before me this 16 day of June 1914.

CLARENCE HOPTON,
Com. of Deeds, # 88, City of New York.

STATE OF NEW YORK, COUNTY OF NEW YORK,
City of New York, Borough of Manhattan, ss:

Philip Leichtentrett being duly sworn, says I reside at No. 512 W. 179th Street, in the City of New York aforesaid, that I am over 18 years of age; that on the 27th day of August, 1914, at Hotel Vanderbilt, 34th St. & Park Avenue in the City of New York, Borough of Manhattan, I served the within summons & complaint on Theodore Voorhees, an officer of the defendant corporation named therein by personally delivering to and leaving a copy thereof with said Theodore Voorhees. I do further say that I know the person so served as aforesaid to be one of the officers of defendant in the within entitled action.

PHILIP LEICHTENTRETT.

Sworn to before me this 28th day of August 1914.

SAMUEL C. STEINBARDT,
Notary Public, No. 3700, New York County.

Register's No. 5216.
Commission expires March 30, 1915.

Endorsed: L-13 P. 107. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy.
6 Summons and Complaint. Joseph A. Shay, Attorney for Plaintiff, 50 Broad Street, New York City. U. S. District Court. Filed Aug. 31, 1914. S. D. of N. Y.

7 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,

against

PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Præcipe.

The clerk is requested to issue summons against the following named defendant, viz:

Philadelphia & Reading Railway Company.

The residence of plaintiff is Yonkers, New York.

Plaintiff is incorporated under the Laws of the State of ——.

And the location of its principal office is ——.

The office of plaintiff's attorney of record is 50 Broad Street, Borough of Manhattan, and all papers in this cause may be served upon me at No. 50 Broad Street, N. Y.

JOSEPH A. SHAY,
Attorney for Plaintiff.

Endorsed: L-13-107. United States District Court, Southern District of New York. —— ——, Plaintiff, vs. —— ——, Defendant. U. S. District Court. Filed Aug. 27, 1914. S. D. of N. Y.

8 United States District Court, Southern District of New York.

Docket No. L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,

against

PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

SIRS: Please take notice that the defendant Philadelphia & Reading Railway Company appears in this action specially for the purpose of making a motion to set aside the service of the summons and complaint herein, and for that purpose only, and we demand that a copy of all affidavits and orders in respect thereto be served upon us

at our office, No. 27 Cedar Street, Borough of Manhattan, City of New York.

Dated, New York, September 18, 1914.

Yours etc.

ARMSTRONG & BROWN,

Appearing Specially for the Purpose of Motion to Set Aside Service of Summons and Complaint Herein for the Defendant, Philadelphia & Reading Railway Co., and for that Purpose Only.

Office & Postoffice Address, 27 Cedar Street, Borough of Manhattan, City of New York.

To Joseph A. Shay, Esq., Attorney for Plaintiff, 50 Broad Street, New York City; Alexander Gilchrist, Jr., Esq., Clerk of the U. S. District Court, South. District of New York.

9 Endorsed: L. 13-P. 107. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company. Copy. Special Notice of Appearance. Armstrong & Brown, Attorneys for Defendant, appearing specially for the purpose of motion only. Office & P. O. Address, 27 Cedar Street, New York City. U. S. District Court. Filed Sept. 19, 1914. S. D. of N. Y.

10 United States District Court, Southern District of New York.

Docket No. L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

SIR: Please take notice that the within proposed order will be presented to Hon. Julius A. Mayer, United States District Judge, at his Chambers in the Woolworth Building, Borough of Manhattan, City of New York, on the 5th day of October 1914, at 2 o'clock in the afternoon for signature.

Dated, New York, October 2nd, 1914.

ARMSTRONG & BROWN,
Attorneys for Defendant.

Office and Postoffice address 27 Cedar Street, Borough of Manhattan, New York City.

To Joseph A. Shay, Esq., Attorney for Plaintiff, 50 Broad Street, New York City.

11 At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the Court-rooms thereof, in the Woolworth Building, in the Borough of Manhattan, City of New York, on the 5th Day of October, 1914.

Present, Hon. Julius M. Mayer, District Judge.

Docket Number L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

The defendant having moved this Court to set aside the service of the summons herein made upon Theodore Voorhees, the president of the defendant, on August 27th, 1914, within the State of New York, at a time when said officer was not in New York on business of said defendant, but on personal matters, coming on to be heard, and said defendant having invoked the provisions of section 1, 14th Amendment of the Constitution and Laws of the United States as a protection against said service,

Now, upon the order to show cause, dated September 16th, 1914, and the affidavits of Theodore Voorhees, verified September 3rd, 1914, Lawrence J. Barrett, verified September 9th, 1914, and Pierre M. Brown, verified September 12th, 1914, read in support of said motion, and the affidavit of Joseph A. Shay, verified the 23rd day of September, 1914, and the affidavit of Philip Leichtenprett, verified September 24th, 1914, and the exhibits attached thereto, in opposition to said motion, and the affidavit of Pierre M. Brown, verified October 1st, 1914, in reply, and the affidavit of
12 Joseph A. Shay, verified October 1st 1914, in rebuttal, and after hearing Pierre M. Brown, counsel for the defendant, in support of said motion, and Joseph A. Shay, counsel for the plaintiff, opposed, it is, upon motion of Joseph A. Shay, the attorney for the plaintiff ordered:

1st. That said motion be and the same is hereby denied upon the sole ground that upon the facts stated in the affidavits of the defendant, used in support of said motion said defendant is doing business within the State of New York so as to be subject to the service of process within said State, and that the claim of the defendant for immunity from service under the Constitution and laws of the United States is denied.

2nd. That said defendant have ten days from the entry and service of an order entered upon this decision, to plead to the complaint, and the right to challenge the jurisdiction of this Court over defendant may be reserved to said defendant in its answer.

JULIUS M. MAYER,
U. S. D. J.

Endorsed: L-13, P. 107. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Order and Notice of Entry. Armstrong & Brown, Attorneys for Defendant. Office & P. O. Address, 27 Cedar Street, New York City. U. S. District Court. Filed Oct. 6, 1914. S. D. of New York.

13 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Affidavit of Service.

David Rosenthal, being duly sworn, says: that he is eighteen years of age and upwards, on the Third of October in the year One thousand nine hundred and Fourteen, he personally served a copy of the annexed order with notice of settlement upon Joseph A. Shay, the Attorney for the Plaintiff in this action at No. 50 Broad Street, Borough of Manhattan, New York, N. Y., by dropping into the mail-drop of the office of Joseph A. Shay, a true copy of the annexed in a sealed wrapper addressed as above.

DAVID ROSENTHAL.

Sworn to before me this 5th day of October, 1914.
[SEAL.] T. D. ENGLISH,
Notary Public, Kings County.

Cert. filed in New York & Nassau Counties.

14 At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the Court-rooms thereof, in the Woolworth Building, in the Borough of Manhattan, City of New York, on the 19th Day of November, 1914.

Present, Hon. Julius M. Mayer, District Judge.

Docket Number L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

The defendant having moved this court to set aside the service of the summons herein upon Theodore Voorhees, the president of the defendant, on August 27th, 1914, within the State of New York, at a time when said officer was not in New York on Business of said defendant, but on personal matters, coming on to be heard, and said

defendant having invoked the provisions of section 1, 14th amendment of the Constitution and laws of the United States as a protection against said service,

Now, upon the order to show cause, dated September 16th, 1914, and the affidavits of Theodore Voorhees, verified September 3rd, 1914, Lawrence J. Barrett, verified September 9th, 1914, and Pierre M. Brown, verified September 12th, 1914, read in support of said motion, and the affidavit of Joseph A. Shay, verified the 23rd day of September, 1914, and the affidavit of Phillip Leichtentritt, verified September 24th, 1914, and the affidavit of Clarence Hopton, verified the 5th day of October, 1914, and the exhibits attached
15 thereto, in opposition to said motion, and the affidavit of Pierre M. Brown, verified the 1st day of October, 1914 and of W. C. Hope, George F. Wernert and Charles H. Gaffney, all verified January 10, 1914, in reply, and the affidavit of Joseph A. Shay, verified October 1st, 1914, in rebuttal, and after hearing Pierre M. Brown, counsel for the defendant, in support of said motion and Joseph A. Shay, counsel for the plaintiff, opposed, it is, on motion of Joseph A. Shay, the attorney for the plaintiff,

Ordered, that said motion be — the same is hereby denied upon the sole ground that upon the facts stated in the affidavits said defendant is doing business within the State of New York, so as to be subject to service of process within said state, and that the claim of the defendant for immunity from service under the Constitution and laws of the United States is denied; and it is further

Ordered, that defendant have five days from the entry and service of an order entered upon this decision, to plead to the complaint, and the right to challenge the jurisdiction of this court over the defendant may be reserved to said defendant in its answer.

JULIUS M. MAYER,
U. S. D. J.

Above order approved as to form only.

ARMSTRONG & BROWN,
Attorneys for Defendant.

16 United States District Court, Southern District of New York.

Docket Number L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Stipulated.

1st. That the affidavit of Clarence Hopton, verified October 5th, 1914, be considered as having been read by plaintiff; those of W. C. Hope, George F. Weinert and Charles H. Gaffney, all verified January 10th, 1914, be considered as having been read for defendant in reply on motion to set aside service of summons herein, and

that the situation of defendant with respect to defendant's doing business in New York on January 10th, 1914, has not been changed since said date, and that the order of this court be resettled accordingly.

2nd. Upon the trial of this action, all affidavits read by either party be recited in said order as resettled may be read in evidence and shall be the only evidence offered as to defendant doing business in said state or as to the validity of the service of the summons herein.

Dated, New York, November 18, 1914.

JOS. A. SHAY,
Attorney for Plaintiff.
ARMSTRONG & BROWN,
Attorneys for Defendant.

17 Endorsed: L. 13, P. 107. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, vs. Philadelphia & Reading Railway Company, Defendant. Original. Consent and Affidavit. Joseph A. Shay, Attorney for plaintiff, 50 Broad Street, Borough of Manhattan, City of New York. U. S. District Court. Filed Nov. 24, 1914. S. D. of N. Y.

18 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
County of New York,
City of New York, ss:

Dorothy Holmes, being duly sworn, deposes and says: That she resides in the Borough of Manhattan, City of New York; that she is upwards of the age of eighteen years; that she is employed in the office of Armstrong & Brown, the attorneys for the defendant in the above entitled action; that on the 30th day of November, 1914, she served upon Joseph A. Shay, Esq., the attorney for plaintiff herein, the annexed Answer, by depositing a copy thereof properly enclosed in a postpaid wrapper in the mail chute at No. 27 Cedar Street, New York City, the same being a post office box regularly maintained by the United States; and from where collections are made by the Hudson Terminal branch of the United States Post Office, located in the Borough of Manhattan, City of New York, addressed to the said attorney at No. 25 Broad Street, New York City, that being the address designated by him for the service of papers in this action.

DOROTHY HOLMES.

Sworn to before me the 30th day of November, 1914.
[SEAL.]
T. D. ENGLISH,
Notary Public, Kings County, #8.

Certificate filed in N. Y. County, #9.

19 United States District Court, Southern District of New York.

Docket Number L. 13, P. 107.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

The defendant, reserving to itself the objection to the jurisdiction of this Court over the defendant in this cause, answering under protest the complaint herein, by Armstrong & Brown, its attorneys, alleges:

First. Said defendant admits that it is a resident and citizen of the State of Pennsylvania and a corporation organized under the Laws thereof; that part of its business is interstate commerce, and that it operates a steam railroad in and through the States of Pennsylvania and New Jersey.

Second. Said defendant denies each and every other allegation in said complaint contained.

And as a further, separate and distinct defense, defendant alleges:

Third. That the accident described in the complaint herein was not caused or contributed to by any negligence on the part of the defendant, but was caused solely through the negligence and carelessness of the plaintiff.

And as a further, separate and distinct defense, defendant alleges:

Fourth. That neither at the time this cause of action arose, nor at the time of the commencement of this action, nor at any
20 time since was the plaintiff a resident, citizen and inhabitant of the State of New York, but was, at all such times, a resident, citizen and inhabitant of the State of New Jersey. The defendant is a foreign corporation, organized under the laws of the State of Pennsylvania; the cause of action did not arise within this State; the defendant does no business and has no property within this State, and this court has not and should not entertain jurisdiction of this cause.

And as a further, separate and distinct defense, defendant alleges:

Fifth. That this Court has no jurisdiction of the person of this defendant and the subject matter of the action, in that the plaintiff is not now and never has been a resident, citizen and inhabitant of the State of New York; the defendant, at all times stated in the complaint, was and now is a foreign corporation; the cause of action arose in the State of New Jersey, and the defendant does no business and has no property in the State of New York.

Sixth. That the summons and complaint herein were served upon Theodore Voorhees, defendant's president, within the State of New York, and at the time of such service defendant's said president was not in the State of New York, engaged in any business of this defendant, but was in this State solely upon his own personal business. That such service was and is void, and the attempt to subject the defendant and its property to the jurisdiction of this Court under such service is in violation of Section 1 of the 14th Amend-

ment to the Constitution of the United States, in that it is an act depriving the defendant of its property without due process of law.

The motion made by the defendant to set aside said service
21 upon said grounds was denied by this Court, reserving to the defendant the right to raise this question in its answer, and this answer is interposed, reserving to said defendant such right, and without waiving any rights the defendant may have with respect to the invalidity of said service.

And as a further, separate and distinct defense, defendant alleges:

Seventh. That at the time of the accident set forth in the complaint herein the plaintiff was a resident of the State of New Jersey, and the contract of employment was made and the injury occurred in said State, and at that time there existed in said State a statute duly passed by the Legislature of that State, entitled an Act prescribing the liability of an employer to make compensation for injuries received by an injured employee, known as Chapter 95 of the Laws of 1911, and certain acts amendatory thereof, and which act regulated the relations of the plaintiff as an alleged employee.

Eighth. That no notice of any intention not to take benefit of said act was ever given by either of the parties to the other, and under such Statute plaintiff is conclusively presumed to have accepted the provisions of said Statute as to compensation; and under such statute the plaintiff was denied the right to sue and his compensation limited to about Four thousand dollars ($4,000).

And as a further, separate and distinct defense, defendant alleges:

Ninth. That this action was begun by the service of a summons and complaint on the 27th day of August, 1914, on the defendant's president. That theretofore and on the 6th day of May, 1913, a summons and complaint in an action in the Supreme Court of the State of New York, Westchester County, brought by this
22 plaintiff against this defendant for the same cause of action set forth in the complaint herein, was served upon defendant. The defendant answered, trial was had, and the jury returned a general verdict for the defendant, and also a special finding that the plaintiff, at the time of the commencement of the action, was not a resident of the State of New York. That thereafter, and on or about the 3rd day of December, 1913, a judgment was entered, dismissing the complaint.

And as a further, separate and distinct defense, defendant alleges:

Tenth. That on or about the 27th day of November, 1913, a summons and complaint in an action in the Supreme Court of the State of New York, Westchester County, brought by this plaintiff against this defendant for the same cause of action set forth in the complaint herein, was served upon the defendant. The defendant answered, trial was had and the jury returned a verdict for the defendant that the plaintiff was not a bona fide resident of the State of New York at the time of the commencement of the action.

Wherefore, defendant demands judgment dismissing the complaint with costs.

ARMSTRONG & BROWN,
Attorneys for Defendant.

Office & P. O. Address, 27 Cedar Street, Borough of Manhattan, New York City.

23 SOUTHERN DISTRICT OF NEW YORK, ss:

Pierre M. Brown, being duly sworn, deposes and says: That he is one of the attorneys for the defendant, Philadelphia & Reading Railway Company in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is not made by defendant, is that said defendant is a foreign corporation, and deponent is one of its attorneys.

That the source of deponent's information and the grounds of his belief are statements and reports made to him by officers and employees of the defendant, concerning the accident set forth in the complaint herein.

PIERRE M. BROWN.

Sworn to before me this 27th day of November, 1914.

[SEAL.] T. D. ENGLISH,
Notary Public, Kings Co., #8.

Cert. filed in N. Y. Co. #9.

Endorsed: L. 13, p. 107. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Answer. Armstrong & Brown, Attorneys for Defendant. O. & P. O. Address, 27 Cedar Street, New York City. U. S. District Court. Filed, Nov. 30, 1914. S. D. of N. Y.

24 At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court Rooms, in the U. S. Court House and Post Office Building, in the Borough of Manhattan, City of New York, on the 8th day of March, in the year of our Lord one thousand nine hundred and fifteen.

Present:

Honorable Julian W. Mack, District Judge.

L. 13, P. 107.

ROBERT J. MCKIBBEN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Now comes the plaintiff by J. A. Shay, his attorney and moves the trial of this cause, likewise comes the defendant by P. M. Brown, its attorney. Thereupon a jury is duly *un*panelled and sworn and the cause proceeds to trial. Thereafter on Wednesday, March 10, 1915, after hearing the evidence of the respective parties the argu-

ments of counsel and the charge of the court, the jury retire in charge of an officer duly qualified to attend them and upon their return say they find a verdict for the plaintiff for $32,500.00.

All motions adjourned to a later date.

An extract from the minutes.

[U. S. D. C. Seal.] ALEX. GILCHRIST, JR., *Clerk.*

(U. S. 10-cent Rev. Stamp.)

25 Endorsed: United States District Court, Southern District of New York. —— —— vs. —— ——.

26 At a Stated Term of the District Court of the United States for the Southern District of New York, held in the Post Office Building, in the Borough of Manhattan, City of New York, on the 19th day of March, 1915.

Present:

Hon. Julian W. Mack, Acting District Judge.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

This cause having been tried at the above Term of Court, and the jury having returned a verdict in favor of the plaintiff and against the defendant in the sum of Thirty-two thousand, five hundred dollars ($32,500), and a motion having been made to set aside the verdict and grant a new trial upon the ground that the Court had no jurisdiction of the defendant, there being no valid service of the summons upon said defendant, upon the ground that the verdict was excessive, contrary to the evidence, contrary to law and against the weight of evidence, and also upon the exceptions taken during the trial, and due deliberation having been had, and the Court having denied the motion, except that the verdict should be set aside as excessive unless the plaintiff consents to reduce the same to the sum of Twenty-five thousand dollars ($25,000) on motion, it is

Ordered, that said motion to set aside the verdict and grant
27 a new trial be and the same is hereby granted, unless within five days from the entry of this order, plaintiff files a consent, signed by his attorney, consenting to reduce said verdict to Twenty-five thousand dollars ($25,000). If the consent is so filed, motion denied.

JULIAN W. MACK,
United States Circuit Judge.

Endorsed: L. 13, 107. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Order Denying Motion. Armstrong & Brown, Attorneys for Defendant. O. & P. O. Address, 27 Cedar Street, New York City. U. S. District Court, Filed Mar. 19, 1915. S. D. of New York.

28 United States District Court, Southern District of New York.

L. 13, P. 107.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

I hereby consent that the verdict of $32,500 rendered plaintiff on the 10th day of March, 1915, in the above entitled action, be reduced to $25,000.

Dated, New York, March 23rd, 1915.

JOS. A. SHAY,
Plaintiff's Attorney.

29 Endorsed: L. 13, 107. U. S. District Court. Filed Mar. 24, 1915. S. D. of N. Y.

30 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Costs of Plaintiff.

Costs.		Disbursements.	
Attorney's Docket Fee..	$20.00	Serving Copy Summons and complaint on defendant	$1.50
		Clerk's fees on entering judgment	11.45
		Clerk's fees on entering judgment	5.10
		Minutes and Stamp	.60
		Disbursements..	$18.65

Costs Taxed at $38.65.

ALEX. GILCHRIST, JR., *Clerk.*

Defendant objects to the taxation of any costs and the entry of judgment on the ground that the court has no jurisdiction.

Objection overruled.

Exception.

CITY AND COUNTY OF NEW YORK, *ss:*

William Livingston, being duly sworn deposes and says: That he is managing Clerk in the office of Joseph A. Shay, attorney for plaintiff herein; that the foregoing disbursements have been made

in said action or may be necessarily made or incurred therein; that they are reasonable in amount.

WM. LIVINGSTON.

Sworn to before me this 16th day of March, 1915.

SAMUEL C. STEINHARDT,
Notary Public, No. 3700, *N. Y. Co.*

31 Endorsed: L. 13, P. 107. United States District Court, Southern District of New York. Robert J. McKibbin, Pl'ff, against Philadelphia & Reading Railway Company, Def't. Bill of Costs and Notice of Adjustment.

Take Notice, that the within is a copy of the items of the Costs and Disbursements in the within action, and that the same will be adjusted by the Clerk of the — Court of U. S. D. C. at his office, in Post Office Building, on the — day of March, 1915, at 11 o'clock in the forenoon of that day, and the amount inserted in the Judgment Roll.

Yours, &c.,

JOSEPH A. SHAY,
Attorney for Plaintiff.

50 Broad Street, New York City.

To Armstrong, Brown & Purdy, Esqs., Attorney- for Defendant.

32 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

The issues in this action having duly come on for trial before Hon. Julian W. Mack, and a Jury, in the United States District Court, Southern District of New York, on the 8th, 9th and 10th days of March, 1915, and the jury having rendered a verdict in favor of the plaintiff and against the defendant for the sum of $32,500.00 and the Court having made an order on March 19th, 1915, granting a motion to set aside the verdict and for a new trial, unless the plaintiff files a consent to the reduction of the verdict to $25,000.00 within five days from the 19th day of March, 1915, and denying said motion if such consent is so filed, and plaintiff, having filed such consent on the 24th day of March, 1915, and the costs having been taxed in the sum of $38.65.

Now, on motion of Joseph A. Shay, Esq., attorney for the plaintiff, it is hereby

Ordered and adjudged, that the plaintiff, Robert J. McKibbin, have and recover from the defendant, Philadelphia & Reading Railway Company, the sum of $25,000 and $38.65, costs as taxed, amounting in the aggregate to $25,038.65, and that he have execution therefor.

Dated, N. Y. March 25, 1915.

ALEX. GILCHRIST, JR., *Clerk.*

33 L. 13, P. 107. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company. Judgment. Joseph A. Shay, Attorney for Plaintiff, 50 Broad Street, Borough of Manhattan, City of New York. U. S. District Court. Filed Mar. 25, 1915, 3:35 P. M. S. D. of N. Y.

34 & 35 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

And now comes the Philadelphia & Reading Railway Company, defendant herein, by Armstrong & Brown, its attorneys, and says, that on or about the 25th day of March, 1915, this court entered judgment herein in favor of the plaintiff and against the defendant for the sum of Twenty-five thousand thirty-eight and 65/100 ($25,038.65) dollars, and on the 19th day of March, 1915, made an order filed in the office of the clerk of this Court, denying defendant's motion to set aside the verdict and for a new trial, in which judgment and order and proceedings prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear by the assignment of errors, which is filed with this petition.

Wherefore, this defendant prays that a writ of error shall issue in its behalf out of the United States Supreme Court, addressed to the District Court of the United States, for the Southern District of New York, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States.

ARMSTRONG & BROWN,
Attorneys for Defendant.

Office & Post-Office Address, 27 Cedar Street, Borough of Manhattan, New York City.

36 [Endorsed:] Docket No. L. 13, P. 107. Clerk's Index No. —. Year —. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Petition for Writ of Error. Armstrong & Brown, Attorneys for Defendant. Office and P. O. Address, No. 27 Cedar Street, Manhattan, New York City.

37 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Know all men by these presents, that the Philadelphia & Reading Railway Company, The defendant herein, is held and firmly bound unto the above named Robert J. McKibbin in the sum of Twenty-seven thousand, five hundred dollars ($27,500.00), to be paid to said Robert J. McKibbin for the payment of which, well and truly to be made, it binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with its seal, and dated the 25th day of March, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, the above named Philadelphia & Reading Railway Company has presented its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled suit in favor of the said Robert J. McKibbin against said Philadelphia & Reading Railway Company for the sum of Twenty-five thousand thirty-eight and 65/100 Dollars and entered in the office of the clerk of the above named Court on March 25th, 1915.

Now, therefore, the condition of this obligation is such that if the above named Philadelphia & Reading Railway Company shall prosecute its writ of error to effect and answer all damages and costs, if it fails to make its plea good, then this obligation shall be
38 & 39 void, otherwise to remain in full force and virtue.

PHILADELPHIA & READING RAILWAY COMPANY,
By THEODORE VOORHEES, [SEAL.]
President.

Attest:
J. V. HARE,
Assistant Secretary.

UNITED STATES OF AMERICA,
District of Pennsylvania, ss:

On this 23rd day of March, 1915, before me personally came Jay V. Hare to me known, who, being by me duly sworn, did depose and say that he resides in the City of Philadelphia, State of Pennsylvania; that he is the Assistant Secretary of Philadelphia & Reading Railway Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

C. K. KLINK,
Notary Public. [SEAL.]

My Commission Expires April 18, 1915.

Above supersedeas bond approved.

JOS. A. SHAY,
Pl'tff's Att'y.

40 [Endorsed:] Docket No. L. 13, P. 107. Clerk's Index No. —. Year —. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Bond. Armstrong & Brown, Attorneys for Defendant. Office and P. O. Address, No. 27 Cedar Street, Manhattan, New York City.

41 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Philadelphia & Reading Railway Company, the defendant above named, by Armstrong & Brown, its attorneys, says that in the record and proceedings in the above Court in the above entitled matter there is manifest error in that the Court decided:

1st. That by the service of the summons herein upon Theodore Voorhees, President of defendant, the Court acquired jurisdiction over defendant.

2nd. That the defendant was doing business in New York.

3rd. That the sending of loaded freight cars over connecting carriers, the fact that tickets for passage were sold in New York by other carriers with coupons attached, good over defendant's lines, and the solicitation of freight business, constituted doing business in New York so as to subject defendant to suits in New York upon causes of action, foreign to such business.

4th. In denying defendant's motion to set aside the service of the summons, made upon the affidavits and in the record and the several motions made upon the trial to dismiss the cause for lack of jurisdiction of defendant and of the cause of action.

Wherefore, said defendant prays that said errors may be
42 corrected and that the judgment entered herein be reversed and the cause dismissed.

ARMSTRONG & BROWN,
Attorneys for Defendant.

Office & Post Office Address, 27 Cedar Street, Borough of Manhattan, New York City.

43 & 44 [Endorsed:] Docket No. L. 13 P. 107. Clerk's Index No. —. Year —. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Assignment of Errors. Armstrong & Brown, Attorneys for Defendant. Office and P. O. Address No. 27 Cedar Street, Manhattan, New York City.

45 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

I, Julian W. Mack, acting Judge of the District Court of the United States for the Southern District *Court* of New York, and who presided at the trial hereof, do hereby certify as follows:

That on the 19th day of November, 1914 and before the time of defendant to answer plaintiff's complaint in the above entitled cause had expired, the defendant, on affidavits and notice to plaintiff, moved this Court to set aside the alleged service on defendant, because defendant was a foreign corporation not having an office or doing business in the State of New York, and the summons was served only upon the president of said corporation, Theodore Voorhis, while said Voorhis was in New York within the jurisdiction of this Court on business personal to himself and not for the corporation defendant.

That on the 19th day of November, 1914, this Court denied the motion without prejudice to defendant to renew the same upon the trial, on the sole ground that it was shown by affidavits in answer to the moving affidavits that defendant was doing business in the State of New York and hence the service upon its president within the jurisdiction of this Court was good service.

46 Defendant was directed to plead over with the right to raise the question in its answer to be considered by the Court at the trial. Defendant duly filed an answer on such conditions.

By stipulation in the record it was agreed that the question of the validity of the service of the summons herein was to be determined upon the affidavits filed upon said previous motion, and that said affidavits were to be the only evidence upon that question upon the trial; and said affidavits are in the record.

Upon the opening of the case defendant, in accordance with the order of this Court entered November 19th, 1914, offered and there was received in evidence, the same affidavits and thereupon moved the Court to dismiss the cause because no valid service of process had been made upon defendant, which motion was overruled and an exception duly taken by defendant. The same motion was made at the close of plaintiff's case and at the close of the entire case, with the same ruling and exception.

The case then proceeded to verdict and final judgment in favor of the plaintiff, and thereupon the defendant again moved to set aside the verdict and judgment upon the same ground, which motion was denied and exception taken.

The certificate is made at the term in which judgment was entered and in conformity to section 238 of the Judicial Code, and the order of this Court dated November 19th, 1914, denying said motion is made a part of the record and certified up with the proceedings and this certificate.

JULIAN W. MACK,
Judge, Holding District Court of the United States
for the Southern District of New York.

47 & 48 [Endorsed:] Docket No. L. 13, P. 107. Clerk's Index No. —. Year —. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Certificate. Armstrong & Brown, Attorneys for defendant. Office and P. O. Address No. 27 Cedar Street, Manhattan, New York City.

49 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Before Hon. Julian W. Mack and a Jury.

Defendant's Bill of Exceptions.

NEW YORK, March 8th, 1915.

Appearances:

Joseph A. Shay, Attorney for plaintiff.
Pierre M. Brown, Attorney for defendant.

A jury was impaneled and sworn.

Mr. BROWN: The defendant moves to dismiss the complaint upon the ground that the court has no jurisdiction over the subject of the action or over the person of the defendant, and offers in evidence stipulation made with respect to this question of jurisdiction between the parties, dated November 18, 1914.

Stipulation marked Defendant's Exhibit A.

Mr. Brown also offers in evidence the order of this court dated November 14, 1914, and all the affidavits therein recited, being taken from the files of this court, and being part of the record in this suit and attached to this record as exhibits.

The COURT: I will deny your motion upon the ground
50 that defendant was and is doing business in New York so as to be subject to process.

Mr. BROWN: I except.

Mr. Shay opened the case to the jury on behalf of the plaintiff.

Mr. Brown opened the case to the jury on behalf of the defendant.

The plaintiff thereupon submitted evidence as to the merits and rested.

March 9, 1915.

Mr. BROWN: If your Honor please, I make the usual motions to dismiss on the ground that they have not made out a case and upon the facts that the court has not jurisdiction of the defendant or the action.

The COURT: Motion denied.

Mr. BROWN: I except.

Defendant thereupon submitted evidence as to the merits and rested, and the plaintiff submitted evidence upon the merits in rebuttal and rested.

The plaintiff having rested, the following motion was made.

Mr. BROWN: I renew my motion to dismiss on the same grounds as stated at the close of the plaintiff's case, and that he has failed to make out a case.

Motion denied.

Exception.

The judge charged the jury upon the merits and later the jury returned a verdict for the plaintiff specially finding that the plaintiff at the time of the commencement of the action was a bona fide resident of New York and assessing damages at $32,500.00, which verdict was ordered set aside and a new trial granted, unless plaintiff consented to reduce same to Twenty-five thousand dollars,
51 which consent was filed and the motion was thereupon denied.

The foregoing bill of exceptions, comprises all the evidence in the case that is material to the questions certified by the District Court of the United States, for the Southern District of New York to the United States Supreme Court, and it is hereby settled and allowed, signed and sealed, and ordered on file and made a part of the record herein, this 30th day of March, 1915.

JULIAN W. MACK, [SEAL.]
United States Circuit Judge, Sitting as District Judge for the Southern District of New York.

Approved and agreed upon.
JOS. A. SHAY,
Attorney for Plaintiff.
ARMSTRONG, BROWN & PURDY,
Attorneys for Defendant.

52 United States District Court, Southern District of New York.

Docket Number L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Stipulated.

1st. That the affidavit of Clarence Hopton, verified October 5th, 1914, be considered as having been read by plaintiff; those of W. C. Hope, George F. Wernert and Charles H. Gaffeney, all verified January 10th, 1914, be considered as having been read for defendant in reply on motion to set aside service of summons herein, and that the situation of defendant with respect to defendant's doing business in New York on January 10th, 1914, has not changed since said date, and that the order of this court be resettled accordingly.

2nd. Upon the trial of this action, all affidavits read by either

party recited in said order as resettled may be read in evidence, and shall be the only evidence offered as to defendant doing business in said state or as to validity of the service of the summons herein.

Dated, New York, November 18, 1914.

JOS. A. SHAY,
Attorneys for Plaintiff.
ARMSTRONG & BROWN,
Attorneys for Defendant.

53 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

Upon the summons and complaint herein, and the attached affidavits of Theodore Voorhees, Lawrence J. Barrett and Pierre M. Brown,

Let the plaintiff show cause to this Court at a Stated Term thereof, to be held in the United States Court Rooms, in the post office building, in the Borough of Manhattan, City of New York, on the 24th day of September, 1914, at the opening of court on that day, or as soon thereafter as counsel can be heard, why an order should not be granted setting aside the service of the summons and complaint herein upon Theodore Voorhees, president of the defendant, on August 27th, 1914, upon the ground that said service was void under the Constitution and laws of the United States, particularly Section 1 of the 14th Amendment.

Further ordered, that the defendant's time to plead, or make such motion with respect to said complaint as it may be advised is hereby extended until ten days after the entry and service of an order upon this motion.

Service hereof five days before the return date shall be sufficient.

Dated, New York, September 16, 1914.

J. M. MAYER,
United States District Judge.

54 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

Theodore Voorhees, being duly sworn, deposes and says: That at all the times hereinafter mentioned I was and now am the president of the Philadelphia & Reading Railway Company, the defendant in this action, which was at all such times, and now is a foreign railroad corporation, organized under the laws of the State of Pennsylvania.

The summons and complaint in this action were personally served upon me at the Hotel Vanderbilt in the Borough of Manhattan, City of New York, on the 27th day of August, 1914 I was not in New York at the time for the purpose of doing any business for the Philadelphia & Reading Railway Company, nor did I do any business for said company while in New York but I was in New York temporarily upon business entirely personal to myself, the circumstances being as follows:

I came from York Harbor, Maine with my wife, bound to Philadelphia, and stopped temporarily at New York at the Hotel Vanderbilt on the evening of August 27th, 1914, leaving the next day by train for Philadelphia. The only business I transacted in New York City was some personal shopping.

THEODORE VOORHEES.

Sworn to before me, this 3rd day of September, 1914.

[SEAL.] J. V. HARE,
Notary Public.

Commission Expires February 21, 1915.

55 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

UNITED STATES OF AMERICA,
Southern District of New York:

Lawrence J. Barrett, being duly sworn, deposes and says: That for more than twenty-one years, I have been and now am an officer of the defendant in this action, to wit: its shipping and freight agent. My office is at Port Reading, N. J., where the alleged cause of action set forth in the complaint herein arose. I am thoroughly familiar with the defendant's properties and business.

Said defendant is engaged in business as a railroad corporation in the States of Pennsylvania and New Jersey. No part of its roadbed or railroad is within the State of New York, nor has it any freight, passenger, ticket offices, agents, or property of any kind in this State. As a common carrier by railroad defendant does no business of any kind in this State, except that some of its freight cars, loaded with merchandise shipped by other persons, are sent over connecting carriers, for delivery in New York, and then to be returned. The connecting carrier receives the compensation for the portion of the entire transportation which is over the line of such connecting carrier and the defendant receives only such portion of the compensation as is due to it for hauling such car on its own line.

56 Coupon tickets for transportation of passengers are also sold in New York, good over defendant's lines, but only by other carriers, the transportation initiating with such carriers

and defendant receiving compensation for the portion of the transportation over its own line.

These facts with respect to the company's business and property are true as of the date of the commencement of this action as well as at the present time.

LAWRENCE J. BARRETT.

Sworn to before me, this 9th day of September, 1914.

[SEAL.] HENRY J. DORGELOH,
Notary Public, Kings County, No. 12.

Certificate filed in New York County, No. 50.
Kings County Register's No. 6008.
New York County Register's No. 6109.
Commission Expires March 30, 1916.
Customs Notary.

57 United States District Co*u*rt, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Pierre M. Brown, being duly sworn, deposes and says: I am one of the attorneys for the defendant herein. Said defendant appears specially in this action for the purpose of this motion to set aside the service of the summons and complaint herein, and for that purpose only.

I have been for many years one of the attorneys for the said railroad company and am thoroughly familiar with its business and properties, and the facts herein stated are within my personal knowledge.

The defendant operates a steam railroad in the States of New Jersey and Pennsylvania. No part of this line is within the State of New York, nor does the said railroad company own any property of any kind or description in this State, nor has it any o-fices therein, nor does it do any business of any kind in this State.

This is the third action plaintiff has begun for the same cause of action. The first case was tried in the State Court, Westchester County, the defendant voluntarily appearing. The jury returned a verdict that the plaintiff was not a bona fide resident of New York and was, in fact, a resident of the State of New Jersey, where the alleged cause of action arose, and the court had therefore no jurisdiction.

58 The plaintiff almost immediately thereafter began a new action in Westchester County, which was again tried with the same result.

On behalf of said defendant, I allege that the service of the summons and complaint herein upon Theodore Voorhees is void, and the

continuance of this suit, under said alleged service, would deprive the defendant of rights guaranteed to it by section 1 of the 14th Amendment of the Constitution of the United States, and under the Constitutional Laws of the United States, it would be a taking of property without due process of law in the event a judgment is recovered and collected; and that said service is void under said Constitution and laws of the United States.

I ask for an order to show cause, for which no other application has been made, for the reason that this motion may not be decided before the defendant's time to answer or plead to the complaint expires.

I am thoroughly familiar with the case, having tried it both times before, and the defendant has fully and fairly stated the facts in the case to me, as its counsel. Said defendant has a good and substantial defence upon the merits of this cause of action, as I verily believe from such statement made to me as aforesaid.

PIERRE M. BROWN.

Sworn to before me this 12th day of September, 1914.

[SEAL.] T. D. ENGLISH,
Notary Public, Kings Co., # 8,
Cert. Filed in N. Y. Co., # 9.

59 United States District Court, Southern District of New York.

ROBERT J. McKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
City of New York, County of New York, ss:

Joseph A. Shay being duly sworn deposes and says: I am the attorney for the plaintiff herein. I believe that I am fully justified in asserting that this motion is not made in good faith. It is merely an attempt to defeat and deprive the plaintiff of a just recovery of damages for serious injuries sustained by him while in the employ of the defendant. The injuries consist of the loss of an arm and a leg. The action is brought to recover under the Federal Employers' Liability Act. I believe the defendant will concede that this is a Federal Employers' Liability case, and, therefore, under that act the plaintiff must commence his action within two years after the injury. The plaintiff's two years will expire on February 18th, 1915. The plaintiff has been in litigation with this defendant now for a period of over a year, and the defendant has constantly interposed technical defences, obviously for the purpose of outlawing the action. It is my belief that upon a denial of this motion the defendant will appeal, and so bar plaintiff's recovery.

The summons and complaint in this case were served by arrangement, and it is submitted by the letters annexed hereto that the

defendant can not now attack the jurisdiction of this Court, having submitted to it by accepting service. On June 30th, 1914, as
60 is shown by said communications, I wrote to the Railroad Company, addressing my letter to its main office in Philadelphia, Pa., apprising it of the fact that I desired to commence an action, and asked it to designate some person upon whom process could be served. On July 1st, the General Solicitor wrote me, referring to my letter, stating that he had handed the same to their New York counsel, Messrs. Armstrong & Brown. Within two or three days thereafter, I phoned Mr. Brown of that firm, and asked him to accept service. He said that he could not do so, but that as soon as Mr. Voorhees, the president of the Company was coming over to New York, he would let me know, so that I could cause service to be made upon him. On August 10th, not having heard from him, I wrote asking whether the president had come over to town as yet, and when service could be made. On August 19th, he replied that he had written the General Solicitor who informed him that Mr. Voorhees had not been in town since I had originally written the Company, that he would be here shortly. He informed me that the General Solicitor did not authorize him to enter an appearance, that I would be notified as soon as the president came to town. On August 21st, I received a letter from Mr. Brown in which he designated the time and place that the president would be in New York. Pursuant to such arrangement and on August 27th, 1914, Mr. Phillip Leichtentritt, an attorney, and managing clerk in my office, went to the Hotel Vanderbilt, and as his affidavit shows, served the same on Mr. Voorhees who accepted the same and who recalled the case, it being well known to the officers of Railroad Company. On September 4th, I wrote Mr. Brown thanking him for his courtesy in arranging service and advising him of the same, and asking him for his answer so that the case might be placed on the October Term of this Court.

61 The defendant's time to answer expired on the 16th day of September, 1914. It will therefore be seen that the defendant did not obtain the order to show cause until the very last day it had to answer the complaint, taking his full twenty days, so as to bring the time nearer to the expiration of the plaintiff's right of action.

Under the circumstances, it must be quite apparent that the service in this case is good and is not in violation of any section of the Constitution of the United States. I therefore ask that the motion be denied and that the extension of time granted under the order to show cause for the defendant to serve its answer be vacated and that the defendant be ordered to serve its answer within two days after the service of an order upon this motion.

JOS. A. SHAY.

Sworn to before me this 23rd day of September 1914.

SAMUEL C. STEINHARD,
Notary Public, N. Y. C.

62 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
City of New York, County of New York, ss:

Phillip Leichtentritt being duly sworn deposes and says: I am an attorney and counselor at law, and associated with Joseph A. Shay, attorney for the plaintiff herein. That on the 27th day of August, 1914, said Joseph A. Shay handed me a letter addressed to him from the attorneys for the defendant herein, stating that Mr. Theodore Voorhees would be at the Hotel Vanderbilt on August 27th, to dine and spend the night. At 5 P. M. of that day, I called at the Hotel Vanderbilt, asked whether Mr. Voorhees was there as yet and was informed that he was not there, but that he was expected. At 6 P. M. I telephoned the Hotel Vanderbilt and asked whether Mr. Voorhees was there and I spoke to a person who said he was Mr. Voorhees. I asked whether or not I could call upon him, stating that I was from Mr. Shay's office and that I had a paper to serve upon him, in his official capacity as an officer of the defendant. I also told him that I believed he knew about such service. He told me that I could come over directly, which I did. At about 6:15 P. M. I called at the Hotel Vanderbilt and asked to see Mr. Voorhees. The Clerk telephoned to his room, giving him my name and stating that I was from Mr. Shay's office with reference to the McKibbin case, and I was asked to step to Mr. Voorhees' room, which I did. I saw a man who said he
63 was Mr. Theodore Voorhees. I asked him if he was an officer of the Philadelphia & Reading Railway Company and authorized to accept service. He said that he was, and I told him that I had a summons and complaint to serve upon him. Mr. Voorhees took the summons and complaint, opened it and looked at it and said "Oh, this is the McKibbin case," to which I replied "Yes sir." He then said, "Oh yes, I know about this."

PHILIP LEICHTENTRITT.

Sworn to before me this 24th day of September 1914.
SAMUEL C. STEINHARD,
Notary Public, N. Y. C.

64 Joseph A. Shay,
Counselor-at-Law,
50 Broad Street, New York.

Telephone 1024 Broad.

June 30th, 1914.

Philadelphia & Reading Railway Co., Philadelphia, Pa., Law Dept.

GENTLEMEN: I desire to commence an action against your railroad.

Will you kindly designate some person upon whom process can be served, or instruct your New York attorneys to accept service? I suppose you will do this in preference to attachment proceedings which will have to be commenced.

I understand you have much property in this State such as railroad tickets, boats, etc., and I wish to avoid any inconvenience which such proceedings would entail.

Awaiting your reply, I beg to remain

Yours very truly,

(Signed) JOSEPH A. SHAY.

J. A. S./J. R. B.

65 Philadelphia & Reading Railway Company,
Legal Department,
Reading Terminal, Philadelphia.

Charles Heebner, General Solicitor.
Wm. L. Kinter, Ass't General Solicitor.

1st July, 1914.

Joseph A. Shay, Esq., 50 Broad Street, New York City.

DEAR SIR: I have this morning your letter of yesterday, addressed to the Philadelphia & Reading Railway Company regarding service of process in a suit which you are about to begin against our Company on behalf of one of your clients.

I have handed your letter to our New York Counsel, Messrs. Armstrong & Brown, 27 Cedar Street.

Yours very truly,

(Signed) CHAS. HEEBNER,
General Solicitor.

66 Joseph A. Shay,
Counselor-at-Law,
50 Broad Street, New York.

Telephone 1024 Broad.

August 10th, 1914.

McKIBBIN
vs.
PHILADELPHIA & R. R. Co.

P. M. Brown, Esq., 27 Cedar Street, New York City.

DEAR PIERRE: Has your president come over to town as yet? When can I make service? Why don't you give me an appearance? It will be easier.

Yours very truly,

(Signed) JOSEPH A. SHAY.

S./B.

67

Armstrong & Brown,
27 Cedar Street, New York,
Borough of Manhattan.

Telephones 5560-1 John.

James Armstrong.
Pierre M. Brown.
William F. Purdy.

August 19th, 1914.

A—3379.

McKIBBIN
vs.
P. & R. RY. Co.

Joseph A. Shay, Esq., 50 Broad Street, City.

MY DEAR SHAY: I wrote again to the General Solicitor and he told me that Voorhees had not been in town since you originally wrote the company, but that he would be here shortly. He declined to authorize me to enter an appearance.

I will notify you as soon as he comes.

Yours very truly,

ARMSTRONG & BROWN.
(Signed) PIERRE M. BROWN.

P. M. B.

68

Armstrong & Brown,
27 Cedar Street, New York,
Borough of Manhattan.

Telephones 5560-1 John.

James Armstrong.
Pierre M. Brown.
William F. Purdy.

August 21st, 1914.

A—3379.

McKIBBIN
vs.
P. & R. RY. Co.

Joseph A. Shay, Esq., 50 Broad Street, City.

DEAR SIR: Mr. Theodore Voorhees will be here in New York at the Vanderbilt Hotel Thursday next, the 27th instant. He will dine there and spend the night.

Yours very truly,

ARMSTRONG & BROWN.
(Signed) PIERRE M. BROWN.

P. M. B./Z.

69

Joseph A. Shay,
Counselor-at-Law,
50 Broad Street, New York.

Telephone 1024 Broad.

September 4th, 1914.

McKibbin
vs.
Philadelphia & Reading R. Co.

Attention of Mr. Brown.

Armstrong & Brown, Esqs., 27 Cedar Street, New York City.

My Dear Brown: I meant to acknowledge yours of the 19th and 21st ult. Pursuant to your arrangement for the service of the summons and complaint in this action, I beg to advise that Mr. Voorhees, defendant's president, was served at the time and place designated by you, and they were undoubtedly turned over to you. Mr. Voorhees remembered the case.

I shall be glad to get your answer so that the case may be noticed for the October term of the Court.

Thanking you for your courtesy in arranging service, I beg to remain.

Yours very truly,
(Signed) JOSEPH A. SHAY.

J. A. S./B.

70 United States District Court, Southern District of New York.

Robert J. McKibbin, Plaintiff,
against
Philadelphia & Reading Railway Company, Defendant.

State of New York,
City of New York,
County of New York, ss:

Clarence Hopton, being duly sworn, deposes and says: I am in the employ of Joseph A. Shay, attorney for the plaintiff herein, and am the person who made service of the Summons and Complaint in the first action brought for this plaintiff upon the then president of the Company. I understand that the defendant claims it does no business in this State. During the course of the trial of the first case, I saw upon the New York Central Railroad tracks at White Plains, cars of the defendant company, with the name of the Philadelphia & Reading Railway upon the same. I have also examined the New York City Telephone Drectory, issued May 8th, 1913, on page 428, and find that the said company is indexed as having a

telephone at the foot of West 23rd Street, and the number is 6550 Chelsea. An examination of the same directory under date of October 16th, 1913, at page 438 discloses the same telephone number and the same address of the defendant's office. The telephone directory of May 7th, 1914, being the last issue, at page 461, gives the same telephone number. The telephone directories give the name of the Philadelphia & Reading Coal & Iron Co., 143 Liberty Street, this City, Telephone Number 5672 Cortlandt, and the Philadelphia & Reading Trans. Line, Towing Dept., same address and same telephone number. I am informed and believe that these are the subsidiary companies of the same Company, and that
71 they tow the cars of said Company from the Jersey points to the City of New York.

On the 31st day of December, 1913, I called at the office of said Company at the foot of West 23rd Street, New York City, Manhattan, and over the door is the name of P. & R. (meaning Philadelphia & Reading) Railway Co. I entered the building and went over to a window over which was also the name of Reading Railway Co., and made inquiries of the person in charge, in reply to which he stated that that was the office of the Philadelphia & Reading Railway Co., and tickets were for sale over the line of said company. I am also informed and believe that defendant's tickets are on sale here and other places in the City of New York, and rates may be obtained, and other business of the Company may be transacted here in the City of New York with its agents.

CLARENCE HOPTON.

Sworn to before me this 5 day of October, 1914.
SAMUEL C. STEINHART,
Notary Public, No. 3700, New York County.
Register's No. 5216.
Commission expires March 30, 1915.

72 United States District Court, Southern District of New York.

Docket Number L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Pierre M. Brown, being duly sworn, deposes and says: I am one of the attorneys for the defendant in this action, and have had entire charge of this litigation.

The action has been twice tried in the State Court, Westchester County. Both times the jury returned a verdict that the plaintiff was not a bona fide resident of the State of New York. This is the third action begun in this jurisdiction.

The affidavits and correspondence read by the plaintiff in opposition to this motion fail to disclose one important fact.

As stated in Mr. Shay's affidavit, I had a telephone conversation with him a few days after the 1st of July, 1914. The exact date was July 7th, 1914. He asked me if I could not arrange to get an appearance for the defendant, and I told him I was not authorized to appear and the defendant would not appear. Further, that if he obtained an attachment against freight cars that had been sent into the state in interstate commerce, the attachment would not be valid, and I referred him to authorities.

Mr. Shay apparently concurred in this, but he insisted that we were, in fact, doing business in this state, because coupon tickets, good over the defendant's lines, were sold by other companies in this state, and because we sent railroad cars over connecting carriers,
and that therefore service made upon one of the defendant's
73 officers within this state would be valid. I told him that I could not concur with him in this, but that if he wanted to try it out, I would tell him when any of the officers of the defendant would be in this jurisdiction, and thus not subject him to the expense of hiring detectives to obtain this information.

Pursuant to this agreement, I requested the general solicitor of the defendant to let me know when any of the officers of the defendant would pass through New York, and upon being advised that Mr. Voorhees was coming through New York from his vacation, I notified Mr. Shay.

I had no authority to appear for the defendant, nor to make any agreement that service on one of the officers of the defendant should be regarded as equivalent to an appearance for the defendant, nor was such an agreement made; and the letters attached to the moving papers disclose that it was the consistent intention of the defendant not to appear or agree to appear.

PIERRE M. BROWN.

Sworn to before me this 1st day of October, 1914.
[SEAL.]
T. D. ENGLISH,
Notary Public, Kings County, #8.

Cert. filed in N. Y. County, #9.

74 COUNTY OF NEW YORK,
State of New York, ss:

W. C. Hope, being duly sworn, on his oath deposes and says that he is upwards of twenty-one years of age and that he is the General Passenger Agent of the Central Railroad Company of New Jersey, and that as such General Passenger Agent, he has full charge and control of the passenger business of the said Company, of the ticket agents and tickets sold by such agents.

Deponent further saith that he is personally familiar with all the details concerning the sale and handling of passenger tickets, and that he is thoroughly familiar with the Twenty-third Street terminal or ferry of the said Central Railroad Company of New Jersey, and that the name "Philadelphia and Reading" or "Reading" appears in several places at the said Twenty-third Street ferry

terminal, but that that terminal, nor any part thereof, is not in any sense the property of the Philadelphia and Reading Railway Company, or an office of that said Company, but that the entire premises are the property of the said Central Railroad Company of New Jersey, and all the employes at that terminal, are the employes of the said Central Railroad Company of New Jersey, except one or more employes, which varies from time to time, who are solely in the employ of the Lehigh Valley Railroad. Deponent further saith that there is at no time with the knowledge or consent of the Central Railroad Company of New Jersey, any employe of the Philadelphia and Reading Railway Company at the said terminal.

Deponent further saith that for the convenience of the public who are not familiar with the fact, that to reach the lines or stations on the lines of the Philadelphia and Reading Railway Company, they must travel over the lines and on the trains of the said Central Railroad Company of New Jersey, the name "Philadelphia
75 and Reading," or "Reading" or such other designation as is applied to the Philadelphia and Reading Railroad Company by members of the public colloquially, are placed in and on this terminal so that such members of the public may be advised that this is the proper station for them to enter to reach any point on the Philadelphia and Reading Railway Company. Similarly, the letters "B. & O." or the words "Baltimore and Ohio" are placed at this terminal to advise members of the public that they must use this terminal to reach the lines of the Baltimore and Ohio Railroad, but none of the employes or men located at this terminal are in the employe or servants or agents of the Baltimore and Ohio Railroad, but are solely the employes, agents and servants of the Central Railroad Company of New Jersey, excepting those employed by the Lehigh Valley Railroad.

Deponent further saith, that attached to this affidavit are two samples, forms of tickets such as are sold at this said terminal, and it will be noted that the name Central Railroad of New Jersey appears at the top of each of these forms of tickets, and that these tickets are Central Railroad Company of New Jersey tickets issued by the said deponent as General Passenger Agent of the said Central Railroad Company of New Jersey. The first coupon of each ticket is the coupon entitling the purchaser of said ticket to travel from New York to Bound Brook, which is as far as the Central Railroad Company of New Jersey transports passengers destined to points on the lines on the Philadelphia and Reading Railway or Baltimore and Ohio Railroad, who are traveling in the general direction of Philadelphia or south thereof. The other coupons on the tickets are coupons good for passage on the lines of the Philadelphia and Reading Railway and the Baltimore and Ohio Railroad respectively.

Deponent further saith that all the offices located at the said ferry terminal at West Twenty-third Street, and all the men and
76 employes, except only those employed by the Lehigh Valley Railroad Company, and baggage men of the New York Transfer Company are employes of the Central Railroad Company

of New Jersey, and while the names of other railroads are displayed there, none of the offices and employes are in any sense the offices or employes of any of those companies, but are solely the offices and employes of the Central Railroad Company of New Jersey and the Lehigh Valley Railroad. Deponent further saith that these offices and employes are no more offices and employes of the Philadelphia & Reading Railway Company, than are the clerks in the office of a general steamship or ticket agent, such as Thomas Cook & Sons or Raymond and Whitcomb, and that in no sense can it be considered that the Philadelphia and Reading or the Baltimore and Ohio Railroad transact any business of any sort at the West Twenty-third Street Ferry terminal, which is the property of the Central Railroad Company of New Jersey.

Deponent further saith that he is familiar with the placing of the words: "Phila. & Reading Ry., ft. W. 23d Chelsea 6550" in the telephone directory of the New York Telephone Company in New York City, and that the Philadelphia and Reading Railway Company does not in any way pay for this wire, either to the New York Telephone Company or to the Central Railroad Company of New Jersey, or anyone else, but that these words were placed in the telephone book for the convenience of members of the public, as a result of the deponent's experience, where passengers living on the lines of the Philadelphia and Reading Railway, thoroughly familiar with that Company and its name, but not familiar with the Central Railroad Company of New Jersey, were at a loss where to make inquiry as to return trains, when on occasion they traveled to New York, on what they believed to be the lines of the Philadelphia and Reading Railway, but which actually were not only the lines of that Company, but from Bound Brook to New York the
77 lines of the Central Railroad Company of New Jersey.

W. C. HOPE.

Sworn to before me this 10th day of January, 1914.

[SEAL.] FREDERICK B. BLACKMAR,
Notary Public, Kings County,
Certificate Filed in New York County.

78

Sample.

6-4-12.

Form B 203.

Central Railroad of New Jersey.

Good subject to the following contract between purchaser and all lines over which this ticket reads, for

One First Class Passage
to
Belle Mead, N. J.
via Bound Brook

When officially stamped and dated and presented with coupons attached.

In selling tickets and checking baggage to points on other roads, this Company assumes no responsibility beyond its own road.

Stop-over privileges are subject to the local regulations of the lines over which this ticket reads.

Baggage will be transported subject to tariff regulations.

The coupon belonging to this Ticket will be void if detached.

W. C. HOPE,
General Passenger Agent.

O.
Form B 203.

	Philadelphia & Reading Railway	Destination Belle Mead, N. J.
	One first class passage Bound Brook to Belle Mead Subject to conditions of contract. This coupon is not good if detached.	
	Form B 203.	
	Issued by Central Railroad of New Jersey.	

Sample.

	Central Railroad of New Jersey	Destination Belle Mead, N. J.
	One first class passage New York to Bound Brook Subject to conditions of contract. This coupon is not good if detached.	
	Form B 203	

Sample.

79 2-9-12.

Form B 259.

Central Railroad of New Jersey.

Non-Transferable.

Good subject to the following contract between purchaser and all lines over which this ticket reads, for

One First Class Passage
to
Washington, D. C.
via Bound Brook

When officially stamped and dated and presented with coupons attached.

In selling tickets and checking baggage to points on other roads, this Company assumes no responsibility beyond its own road.

Stop-over privileges are subject to the local regulations of the line over which this ticket reads.

Baggage will be transported subject to tariff regulations.

The coupons belonging to this ticket will be void if detached.

W. C. HOPE,
General Passenger Agt.

D.
Form B 259.

	Baltimore & Ohio Railroad	Destination Washington, D. C.
	One first class passage Philadelphia to Washington Subject to conditions of contract. This coupon is not good if detached.	
	Sample Form B 259	
D	Issued by Central Railroad of New Jersey.	

	Philadelphia & Reading Railway	Destination Washington, D. C.
	One first class passage Bound Brook to Philadelphia Subject to conditions of contract. This coupon is not good if detached.	
	Form B 259	
D	Issued by Central Railroad of New Jersey.	

	Central Railroad of New Jersey	Destination Washington, D. C.
	One first class passage New York to Bound Brook Subject to conditions of contract. This coupon is not good if detached.	
D	Form B 259	

80 STATE OF NEW YORK,
County of New York, ss:

George F. Wernert being duly sworn upon his oath deposes and says:

That he is upwards of twenty-one years of age, and is employed as Station Master by the Central Railroad Company of New Jersey, being in charge of the Ferry Terminal of that Company located at the foot of West 23rd Street, New York City, New York. That

he is personally familiar with this entire terminal and that the terminal is the terminal of the Central Railroad Company of New Jersey and of no other company, except that the Lehigh Valley Railroad Company under contract with the said Central Railroad Company of New Jersey has the right to use said terminal, and has one or more employes at that terminal, but that neither the Philadelphia & Reading Railway Company nor the Baltimore & Ohio Railroad Company have any employes of any kind at the said terminal.

Deponent says that for the information of the public so that they may be advised that this terminal of the Central Railroad Company of New Jersey is the proper terminal for them to enter to take trains by which they can reach the lines of the Philadelphia & Reading Railway Company and the Baltimore & Ohio Railroad Company has displayed on its various signs and names in addition to the name of the Central Railroad Company of New Jersey to so advise the public, and that an electric sign with the letters "P. & R." is on the terminal facing West 23rd Street, and also the words "Baltimore & Ohio." Deponent also says that at the river end of this terminal the letters "P. & R." and that the words "The Reading" appear on glass signs over each of the three ticket windows where passengers purchase tickets from the Central Railroad Company of New Jersey, which tickets entitle them to ride on
81 the trains of the said The Central Railroad Company of New Jersey, and then by additional coupons entitled them to ride on the lines of the Philadelphia & Reading Railway or the Baltimore *or* Ohio as the case may be.

Deponent further says that he is in charge of all the employees located at this station excepting those employees in the employ of the Lehigh Valley Railroad Company over whom he has a general supervisory capacity as well as one or more employees of the New York Transportation Company, a baggage Company who transport baggage from that station to various points in New York City, etc.

Deponent says that there has at no time been any man or men at this station in the employ of the Philadelphia & Reading or Baltimore & Ohio Railroad, but that if any member of the public inquires at that station if this is the Philadelphia & Reading or the Reading he is told that it is, because such inquiries are propounded in the experience of the deponent and the other men at this station by members of the public who wish to travel on the lines of the Philadelphia & Reading Railway and who are not aware of that fact that to reach the lines of that Company they must first travel on the lines of the Central Railroad Company of New Jersey, but that — no office at this station and no employees is the office or employee of the Philadelphia & Reading Railway Company, for that Company does no business of any sort whatever at this station.

Deponent further says that any display of the name of the Philadelphia & Reading Railway Company or any colloquial phrase or letters designating that Company that are displayed are solely for the information of the public and are not intended as a signification

that any one connected with the Philadelphia & Reading Railway Company is located at this station or ferry terminal.

GEORGE F. WERNERT.

Sworn to before me this 10th day of January, 1914.

[SEAL.] FREDERICK B. BLACKMAR,
Notary Public, Kings County.

Certificate filed in New York County.

82 STATE OF NEW YORK,
County of New York, ss:

Charles H. Gaffeney, being duly sworn under oath deposes and says:

That he resides in Jersey City, County of Hudson, State of New Jersey, and that he is upwards of twenty-one years of age, and is employed as Chief Clerk to the Superintendent of Telegraph of the Central Railroad Company of New Jersey, and that as such Chief Clerk he has charge of all the details of the telegraph and telephone service of the said The Central Railroad Company of New Jersey, and is personally familiar with all matters pertaining thereto in so far as they relate to the routine business.

Deponent says that for the convenience of members of the public who desire to take trains reaching points on the line of the Philadelphia & Reading Railway Company and do not know that they must take train of the Central Railroad Company of New Jersey to reach the lines of the Philadelphia & Reading Railway Co., the name of the Philadelphia & Reading Railway was inserted at his direction in the New York telephone directory as it appears at present on page 438 of said directory, to wit, as follows: "Phila. & Reading Ry. ft. W. 23d Chelsea, 6550."

Deponent further says that the trunk wire designated by the New York Telephone Company as "Chelsea 6550" is a trunk wire assigned to the said The Central Railroad Company of New Jersey by the New York Telephone Company, and is paid for by the said The Central Railroad Company of New Jersey under its contract with the said New York Telephone Company, and will be found in the telephone directory of said Telephone Company on page 120 thereof in the first column under the title Central Railroad Company — New Jersey four times for various offices of the said The Central Railroad Company of New Jersey located at foot of West 23rd St., New York City.

83 Deponent further says that no bill is ever rendered to the Philadelphia & Reading Company for this telephone trunk line or wire nor for any messages sent or received on such wire or any other wire, but that the insertion of the name of the Philadephia & Reading Railway in the New York Telephone directory is entirely for the convenience of the members of the public who may not be informed that they must travel on the lines of the said The Central Railroad Company of New Jersey to reach the lines of the Philadelphia & Reading Railway Company.

Deponent further calls attention to the fact that on page 120 of the New York Telephone directory will be found under the name of Central Railroad — New Jersey the following: "Information Bureau, ft. W. 23d" and "Prlr. & Slping Car Tk. Off. ft. W. 23d," and deponent says that both of these last mentioned names are placed in the telephone book for the convenience of the public, just as the name Phila. & Reading Ry. is placed therein, and that the Central Railroad Company of New Jersey is the only party that contracts with the Telephone Company for such service and pays all the bills for same under its contract with that Company, and does not in any way bill the Philadelphia and Reading Railway Company for any such items.

CHARLES H. GAFFENEY.

Sworn to before me this 10th day of January, 1914.

[SEAL.] FREDERICK B. BLACKMAR,
Notary Public, Kings County.

Certificate filed in New York County.

84 United States District Court, Southern District of New York.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Joseph A. Shay, being duly sworn deposes and says: I am the attorney for the plaintiff herein. I have read the opposing affidavit of Pierre M. Brown, defendant's counsel. A statement is made by Mr. Brown that it was the intention merely, on our part, to test the question of service. That is new to me. We had been all over this in the State Court. On the first trial of the case, he did not contest the service, though it was similarly made. The second service, however, he contested by means of a motion to set aside the service, which was denied by Mr. Justice Tompkins, and upon the defendant's appeal to the Appellate Division, Second Department, the order of Judge Tompkins was unanimously affirmed. The case then proceeded to trial. When I wrote my letter to the defendant, at Philadelphia, I had every intention of making a service which would stand, and when Mr. Brown arranged with me for the service in this case, I had no thought that he would make any contest of the service, in view of the decision of the Appellate Division.

85 Plaintiff is a resident of this State. Service was made upon the defendant's president by arrangement, as the letters clearly show. I do not know whether Mr. Brown had the authority to appear, nevertheless, he did nothing, as his affidavit shows, without consulting the officers of the defendant. When I wrote the head

office at Philadelphia to arrange for the service, and when I spoke with Mr. Brown, I had no thought of bringing the action in this Court. Mr. Brown is therefore in error, when he states that I wished to test the question of the validity of service with him, because, as I before stated, he was concluded by the decision of the Appellate Division. It was only when he found that the case was brought in this Court, where a different rule obtains as to service upon an officer of a foreign corporation while in this State, not on the business of the Company, that he determined to bring this motion. It was clearly my intention, and his as well, to make service possible, to avoid attachment proceedings. Mr. Voorhees was not decoyed into the State, and the attempt now to nullify service is a mere afterthought. The letters clearly disclose the intention. My first letter to the Company was open, and no attempt to practise deception was made either verbally or in writing.

If this service is not permitted to stand, then no arrangement between counsel to served process could hold.

It is submitted that this motion is not bona fide but is merely one of the many technical moves the defendant is interposing, in order to avoid its liability to the plaintiff.

JOSEPH A. SHAY.

Sworn to before me this 1st day of October, 1914.

CLARENCE HOPTON,
Comm. of Deeds, N. Y. City.

86 At a Stated Term of the District Court of the United States for the Southern District of New York, held in the court rooms thereof, in the Woolworth Building, in the Borough of Manhattan, City of New York, on the 19th day of November, 1914.

Present:

Hon. Julius M. Mayer, District Judge.

Docket Number L. 13, P. 107.

ROBERT J. MCKIBBIN, Plaintiff,
against
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

The defendant having moved this court to set aside the service of the summons herein upon Theodore Voorhees, the president of the defendant, on August 27th, 1914, within the State of New York, at a time when said officer was not in New York on Business of said defendant, but on personal matters, coming on to be heard, and said defendant having invoked the provisions of section 1, 14th amendment of the Constitution and laws of the United States as a protection against said service.

Now, upon the order to show cause, dated September 16th, 1914, and the affidavits of Theodore Voorhees, verified September 3rd,

1914, Lawrence J. Barrett, verified September 9th, 1914, and Pierre M. Brown, verified September 12th, 1914, read in support of said motion, and the affidavit of Joseph A. Shay, verified the 23rd day of September, 1914, and the affidavit of Phillip Leichtentritt, verified September 24th, 1914, and the affidavit of Clarence Hopton, verified the 5th day of October, 1914, and the exhibits attached thereto, in opposition to said motion, and the affidavit of Pierre M.
87 & 88 Brown, verified the 1st day of October, 1914, and of W. C. Hope, George F. Wernert and Charles H. Gaffney, all verified January 10, 1914, in reply, and the affidavit of Joseph A. Shay, verified October 1st, 1914, in rebuttal, and after hearing Pierre M. Brown, counsel for the defendant, in support of said motion and Joseph A. Shay, counsel for the plaintiff, opposed, it is, on motion of Joseph A. Shay, the attorney for the plaintiff,

Ordered, that said motion be and the same is hereby denied upon the sole ground that upon the facts stated in the affidavits said defendant is doing business within the State of New York, so as to be subject to service of process within said state, and that the claim of the defendant for immunity from service under the Constitution and laws of the United States is denied; and it is further

Ordered, that defendant have five days from the entry and service of an order entered upon this decision, to plead to the complaint, and the right to challenge the jurisdiction of this court over the defendant may be reserved to said defendant in its answer.

JULIUS M. MAYER, *U. S. D. J.*

Above order approved as to form only.

ARMSTRONG & BROWN,
Attorneys for Defendant.

89 [Endorsed:] Docket No. L. 13, P. 107. Clerk's Index No. —, Year —. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Defendant's Bill of Exceptions. Armstrong & Brown, Attorneys for Defendant, Office and P. O. Address No. 27 Cedar Street, New York City, Manhattan.

90 By the Honorable Julius M. Mayer, one of the judges of the District Court of the United States for the Southern District of New York, to Robert J. McKibbin, Greeting:

You are hereby cited and admonished to be and appear before a Term of the Supreme Court of the United States, to be holden at the Capitol in the City of Washington, in the District of Columbia, on the 4th day of June, 1915, pursuant to a writ of error filed in the office of the clerk of the District Court of the United States, for the Southern District of New York, wherein the Philadelphia & Reading Railway Company is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the order and judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, City of New York, at the Southern District of New York, this 5th day of May, in the year one thousand, nine hundred and fifteen and of the Independence of the United States the One hundred and thirty-ninth.

JULIUS M. MAYER,
Judge of the District Court of the United States for the Southern District of New York.

91 & 92 Endorsed: Docket No. L. P. 107. Clerk's Index No. —. Year —. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Copy. Citation. Armstrong & Brown, attorneys for defendant, office and P. O. address, No. 27 Cedar Street, New York City, Manhattan.

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court of the United States, for the Southern District of New York, before you, or some of you, between Robert J. McKibbin, plaintiff, and Philadelphia & Reading Railway Company, defendant, a manifest error hath happened, to the great damage of the said Philadelphia & Reading Railway Company, defendant, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf,

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Supreme Court, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 4th day of June, 1915, that the record and proceedings aforesaid being inspected, the said Judges of the United States Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, Hon. Edward D. White, Chief Justice, of the United States, this 5th day of May, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and thirty-ninth.

94 & 95 ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States for the Southern District of New York.
[SEAL.]

The foregoing writ is hereby allowed.
JULIUS M. MAYER,
U. S. District Judge.

96 [Endorsed:] Docket No. L. P. 107. Clerk's Index No. —. Year —. United States District Court. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Coal and Iron Company, Defendant. Copy. Writ of Error. Armstrong & Brown, attorneys for defendant, office and P. O. address, No. 27 Cedar Street, New York City, Manhattan.

97 & 98 United States District Court, Southern District of New York.

L. 13, 107.

ROBERT J. MCKIBBIN, Plaintiff,
vs.
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

It is Hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated May 17th 1915.

JOSEPH A. SHAY, *Attorney for Plaintiff.*
ARMSTRONG, BROWN & PURDEY,
Attorneys for Defendant.

99 UNITED STATES OF AMERICA,
Southern District of New York, ss:

L. 13, 107.

ROBERT J. MCKIBBIN, Plaintiff,
vs.
PHILADELPHIA & READING RAILWAY COMPANY, Defendant.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 17th day of May in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the said United States the one hundred and thirty-ninth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 5/17/15. A. G. Jr.]

100 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court of the United States, for the Southern District of New York, before you, or some of you, between Robert J. McKibbin, plaintiff, and Philadelphia & Reading Railway Company, defendant, a manifest error hath happened, to the great damage of the said Philadelphia & Reading Railway Company, defendant, as is said and appears by its complaint, We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf,

Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Supreme Court, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 4th day of June, 1915, that the record and proceedings aforesaid being inspected, the said judges of the United States Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, Hon. Edward D. White, Chief Justice of the United States, this 5th day of May, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of
101 & 102 the United States the one hundred and thirty-ninth.

ALEX. GILCHRIST, JR.,
Clerk of the District Court of the United States, for the Southern District of New York.

The foregoing writ is hereby allowed.

JULIUS M. MAYER,
U. S. District Judge.

103 [Endorsed:] Docket No. L. 13, P. 107. Clerk's Index No. —, Year —. United States District Court, Southern District of New York. Robert J. McKibbin, Plaintiff, against Philadelphia & Reading Railway Company, Defendant. Original Writ of Error. Armstrong & Brown, Attorneys for Defendant, Office and P. O. Address, No. 27 Cedar Street, New York City, Manhattan.

Due and timely service of a copy of the within Writ of Error and notice hereon endorsed is hereby admitted. Dated, New York, May 6", 1915. Joseph A. Shay, Attorney for Pl'ff. U. S. District Court, S. D. of N. Y. Filed May 7, 1915.

Endorsed on cover: File No. 24,742. S. New York D. C. U. S. Term No. 475. Philadelphia and Reading Railway Company, plaintiff in error, vs. Robert J. McKibbin. Filed May 21, 1915. File No. 24,742.

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Argued by
PIERRE M. BROWN.

SUPREME COURT OF THE UNITED STATES.

PHILADEPHIA & READING RAILWAY COMPANY,
Plaintiff-in-Error
(Defendant below),
against
ROBERT J. McKIBBIN,
Defendant-in-Error
(Plaintiff below).

(Throughout this memorandum the defendant-in-error will be called the plaintiff, and the plaintiff-in-error will be called the defendant.)

STATEMENT OF THE CASE.

This case comes direct to this court from the United States District Court, Southern District of New York, on writ of error and on certificate of the Trial Judge, issued under Section 238 of the Judicial Code.

The question is whether the United States District Court, Southern District of New York, where this suit originated, acquired jurisdiction of the defendant, a Pennsylvania corporation, by the ser-

vice of a summons upon its president while temporarily in New York on personal business. The cause of action was for personal injuries sustained by plaintiff in New Jersey, of which state plaintiff was, at the time, a resident.

After the accident plaintiff acquired a residence in New York and began this action. Defendant's motion to set aside the service was denied with liberty to the defendant to set the same facts forth in its answer as a defense or plea, and the affidavits used upon the motion were agreed to be submitted as the only evidence upon the subject. Defendant's several motions to dismiss at the trial were denied and a verdict rendered for the plaintiff.

The service is clearly invalid under familiar and oft repeated decisions of this Court, unless the defendant is doing business in New York. The nature of this business is set forth in the affidavits and is not denied, and the facts are precisely the same as were presented in the case of *Takacs* vs. *Philadelphia & Reading Railway Company*, decided by Judge Mayer of the United States District Court, Southern District of New York, where the conclusion was reached that the service upon a resident director was invalid. A copy of Judge Mayer's decision is hereto annexed as the case is not reported.

Briefly, the sole business defendant transacts in New York is that through freight cars are sent over connecting carriers into New York and returned, and passenger tickets, with coupons, good over the defendant's lines, are sold by other companies for the convenience of the travelling public. None of defendant's lines are in the state, nor does it maintain or contribute to the support of

any office in New York, except that it has soliciting freight agents in the state.

It has no agent in New York designated to accept service of process.

It is urged by the defendant:

1st: Under the authorities, the above acts do not constitute the doing of business in New York.

2nd: If it may be regarded as doing *some* business, defendant cannot be subjected to suits except with relation to that business.

SPECIFICATION OF ERRORS.

The assignment of errors presents for review the Court's order denying defendant's motion made before trial, upon affidavits, to set aside the service of the summons; also the same ruling made on the trial and after the verdict.

ARGUMENT.

POINT I.

DEFENDANT IS NOT TRANSACTING BUSINESS IN NEW YORK.

Green vs. Chicago, Burlington & Quincy Ry. Co., 205 U. S., 530.

In that case the defendant was a citizen of Iowa, and the action was brought in the United States Circuit Court for the Eastern District of Pennsylvania. Service was shown by the following return, stating that the writ had been served "on Chicago, Burlington & Quincy Railway Company, a cor-

poration which is doing business in the Eastern District of Pennsylvania * * * by giving a true and attested copy to Harry E. Heller, agent of said corporation."

Heller was an employee of the defendant, designated as the district freight and passenger agent. The company hired an office for him in Philadelphia, his connection with the company was advertised, and he was employed as solicitor to procure passengers and freight to be transported over the defendant's lines.

Clerks, passenger and freight agents were employed, who reported to Heller. This Court said:

> "The business shown in this case, was, in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transaction will constitute 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This view accords with several decisions in the lower Federal Courts."

This Court cited, among other cases, that of *Earle* vs. *Chesapeake & Ohio Railway Co.*, 127 Fed., 235.

In the Earle case the defendant corporation was a citizen of Virginia. Service was made upon defendant's assistant secretary, who resided in Philadelphia, action being brought in the United States District Court, Eastern District of Pennsylvania.

It appeared that defendant participated in the maintenance of an office for the solicitation of freight in the Eastern District of Pennsylvania;

that it delivered to connecting carriers loaded freight cars, destined for points in Pennsylvania, and that the Pennsylvania Railroad sold tickets at its office in Philadelphia, with coupons attached, good over defendant's lines.

In holding that these acts did not constitute doing business by the corporation in the Eastern District of Pennsylvania, the Court said:

> "As it seems to me nothing in the foregoing statement constitutes such a doing of business in the State of Pennsylvania as subjects the defendant to the jurisdiction of the Courts. * * * Neither does the transit of the defendant's freight and passenger cars across the state, either separately or in solid trains, constitute the transaction of corporate business by the defendant. * * * The transportation is not the defendant's act, and the fact that its cars continue to be used, for the convenience of passengers and shippers, after the state line has been reached, is unimportant. To hold otherwise would make many railroad companies suable in nearly every state in the Union, for it is well known that a freight car of any railroad may visit many states before it is finally returned to its owner. Such cars are really hired to other carriers and for the time are the cars of the railroad that hauls them. *The sale of tickets over the defendant's railroad by the Pennsylvania Company in Philadelphia is only made in connection with the sale of the Pennsylvania Company's own tickets, and is largely for the convenience of travellers.* If this constitutes the transaction of corporate business in a state,

it is possible that every important railroad company in the United States may be sued in this district, and in many other districts as well. Finally to maintain a freight soliciting agency in connection with other transportation companies has been decided not to subject the various companies to suit in the jurisdiction where the agency is maintained. Pennsylvania R. R. Co. vs. Rogers, 44 S. E., 300 (52 W. Va., 450)."

In MAXWELL vs. ATCHISON T. & S. F. R. CO., 34 Fed., 286, which was likewise cited by this Court in the Green case, the defendant was a corporation of Kansas and was served in Michigan. The defendant had an arrangement with one Gilman by which it paid his desk room and was employed to solicit passenger traffic over the defendant's lines. The defendant's folder represented Gilman as the passenger agent in Michigan. At page 290 the Court stated:

"From the folders of the company it appears that it has agents of this description in at least a dozen different states. If it can be sued in this state for a cause of action arising in Kansas, it is equally amenable to suit in any one of these states in which it may happen to have a passenger agent for soliciting business. It would, in my opinion, be an unwarranted extension of the law of constructive presence to hold the road liable to suit in all these different states as a corporation inhabitant or found therein. The same principle would make every manufacturing or trading corporation liable to suit in any state in

which it sent a commercial agent or drummer to solicit patronage."

It is safe to say that most of the railroad corporations, and many of the industrial corporations of the country have an officer either resident in New York or occasionally coming to New York, and which corporations do business in the same way as this defendant.

The invalidity of the service in the case at bar, for the reasons set forth in this point, is sustained both by the authorities and sound reason.

POINT II.

EVEN IF THE DEFENDANT DID SOME BUSINESS IN NEW YORK, IT CANNOT BE SUBJECTED TO SUITS UPON CAUSES OF ACTION WHOLLY FOREIGN TO SUCH BUSINESS.

This is a question of great interest and importance, concerning which this Court has recently laid down a wholesome rule.

To illustrate: Take the case of a corporation resident in California, which makes an occasional sale of goods in New York and happens to have a director or officer resident in that State. There can be no doubt but that the corporation ought to be subject to suits in New York arising out of the sales so made. Surely, if it seeks the protection of the statutes of New York and the aid of its courts in enforcing contracts made in that state, it ought to respond to actions which may be brought against it, arising out of such business. But should the corporation be compelled to respond in New York to personal injury actions arising at the home of

its residence, or in far distant states, and having no relation whatever to the business the company transacts in New York?

The present highly perfected methods of communication, travel and shipment are done upon a scale unknown fifty years ago. Corporations, resident in one state, make contracts to send their goods into every other state of the Union, and so, in a sense, are doing business in every such state.

As stated in Point I, most of the railroad and many of the industrial corporations have a director or officer resident in New York, so that if the rule sought to be sustained by the plaintiff is to prevail, the litigating of every case against such a corporation, no matter where it arose, can be imposed upon the courts of that state, and the defendant be compelled to try actions far distant from their origin and utterly foreign to the business it transacts in the state of the forum.

The law keeps pace with the change of conditions in the business world. It is surely desirable that litigation be confined as far as possible to the locality where it arises, and we think it is possible to promote this result from the law as it now stands.

A corporation that does *any* business in the State of New York is undoubtedly deemed by the law to be within that State, so far as that business is concerned, and service upon *any* officer or agent, other than some subordinate employee, in an action arising out of such business is sufficient.

A corporation is not, in the eye of the law, present within the territory of a state, with respect to claims arising in other states, simply because it happens to have a director that lives in the state.

Simon vs. Southern Ry. Co., 236 U. S., 255;
Riverside, etc. Co. vs. Manefee, 237 U. S., 189.

In the Simon case the Southern Railway Company, by doing business in Louisiana, was held to have impliedly consented to being sued by service upon the Secretary of State, but only with regard to the business it did in that state. This might be put in this way. The Secretary of State carried the corporation with him with regard to such business and the corporation was actually present in the state. So far as business that was transacted outside of the state is concerned, the Secretary of State did not carry the corporation with him.

The same reasoning would apply to the case of a designated agent. A corporation of California that sells goods in New York is required to appoint a designated agent in order to prevent being an outlaw in New York and to enable it to sue to enforce contracts made *here*. Undoubtedly, if it had the right to sell goods and sue here, it ought to, as a matter of course, be required to respond to suits of citizens of New York arising out of those transactions, but it could hardly be said to be the policy of the law to require the corporation and the courts of New York to litigate all other causes of action arising against the corporation, and as to which this business done by the company in New York is in no wise concerned.

New York, probably more than any other state, has jealously maintained jurisdiction of causes of action that might well have been litigated where they arose and there was for many years a conflict between the Court of Appeals of New York and the Supreme Court of the United States upon this question of service upon an itinerant officer.

The history of this conflict is well set forth in the opinion of Judge Clark in *Grant* vs. *Cananea Consolidated Copper Co.*, 117 A. D., 576, where the Federal rule was followed and the service set aside.

This decision was reversed by the Court of Appeals in 189 N. Y., 241, but the Court, in its opinion, receded from the position maintained for years. At page 249 the Court said:

> "While we entertain the view that our statute upon the subject furnishes the safer and wiser rule to follow, we shall, in this case, recognize and attempt to follow the rule laid down in the Federal Court."

And in *Severn* vs. *Lackawanna Coal Co.*, not reported, a copy of which opinion is hereto attached, the Supreme Court of New York set aside the service following the opinion of this Court in *Riverside, &c.* vs. *Menefee*, supra, and upon precisely the same facts.

The attitude of the courts with respect to these foreign causes of action being imported into this state is shown in the opinion in *Pietraroia* vs. *N. J. & H. R. R. & F. Co.*, 197 N. Y., 437, page 439. The Court said:

> "As a question of policy, it is intolerable that our courts should be impeded in their administration of justice and that the people of the state should be burdened with expense in redressing wrongs committed in another state for the benefit solely of its citizens and where the remedy is in the enforcement of its statutes."

And despite the provisions of section 1780 of the Code of Civil Procedure, which provide that a resident of the state may maintain an action against a foreign corporation for any cause of action, the Court, in the case of *Zeikus* vs. *Florida East Coast Railway Co.*, 144 A. D., 91, said:

> "While section 1780 of the Code provides that an action may be maintained by a resident of this state against a foreign corporation for any cause of action, it has not been held that the section requires the courts of this state to take jurisdiction of this class of actions simply because an administrator has been appointed in this state."

And later:

> "It seems to me that it was within the discretion of the Supreme Court to decline jurisdiction in a case like this."

In the Zeikus case the administrator was both officially and personally a resident of the state, although those to be benefited by the recovery were non-residents.

In Tennessee the same rule was laid down in the case of

Peters vs. Neely, 16 Lea, 275.

> "The general rule is that jurisdiction of a court over a foreign corporation by service of process on a resident agent is limited to cases founded upon contracts made, or transactions occurring in the state. The reason of the rule

is that the corporation expressly or tacitly consents to accept service of process on its agent in all matters in which it is permitted to act by comity without express authority."

So also in Georgia in the case of *Bawknight* vs. *The Liverpool & London, etc. Co.*, 55 Georgia, 194, where the plaintiff sued a foreign corporation in Georgia on a judgment obtained in Florida, the agent of the company in Georgia being served. An extract from the opinion of the Supreme Court of Georgia is as follows:

> "We are not aware of any case which has decided that a foreign corporation may be sued *in personam* here on a foreign judgment, or *on a contract or debt* of any sort with which the Georgia agency has had no connection. It would be strange if such were the law. A debt created in England by this English corporation could then be sued here; a debt made in China might be sued in personam here, where this *corporation is allowed to live only for certain purposes, instead of being sued at home, where it lives for all purposes.* There is good reason for so restricting the statute. The agent in Georgia might be able easily to defend a Georgia contract, where he had made or supervised it, where all the witnesses lived and were accessible to him; but it would be difficult for him, nay, impossible, to defend an English or Chinese contract without great hazard and expense; and for the very reason that he could not well and readily defend such a contract, suit would be brought upon them here, judgment in personam be rendered, and

then suit on that brought at the home office, and it be concluded without opportunity to defend on the merits."

In the Simon case the corporation was held not to be within the State of Louisiana and that the Secretary of State did not represent the corporation except with respect to the business done in that state. Why should not the same rule obtain in regard to a local resident officer or a designated agent, appointed voluntarily but only with regard to the business done in the state?

It logically follows that as to the business a corporation does not do in the state, it is not to be regarded as being within the state.

There are over 200,000 men employed in the mining regions of Pennsylvania. Work there is dangerous and accidents are of frequent occurrence. Within the last two or three years it has become the custom of importing these injured plaintiffs into New York, acquire a so-called residence, and then sue in New York, where living is more expensive and money correspondingly cheaper and verdicts larger.

If it be finally settled that a corporation is not present in a state except as to business done therein, this practice will be abolished.

The judgment should be reversed and the cause remanded with instructions to dismiss the action.

Respectfully submitted,

PIERRE M. BROWN,
Counsel for Plaintiff-in-Error,
Defendant below.

SUPREME COURT,

KINGS COUNTY,

Special Term—March, 1915.

ARTHUR SEVERN

against

LACKAWANNA COAL COMPANY, LIMITED.

Motion by defendant to set aside the service of summons and complaint.

PIERRE M. BROWN, for the motion.
JULIUS I. POPPER, opposed.

KELLY, J.:

The summons and complaint in this action were served upon S. Brinkerhoff Thorne, in the City of New York, on February 13th, 1913. He makes affidavit that he resides in the City and State of New York, that he is the vice-president of the defendant, which is a corporation organized and existing under the laws of the State of Pennsylvania. The complaint alleges that the defendant is a foreign corporation operating a colliery at Olyphant, in the State of Pennsylvania, and that on October 27th, 1913, plaintiff, while in defendant's employ at said colliery, was injured through the negligence of defendant and without fault on his own part. Various details of the alleged negligence are set

forth in the complaint, and it is charged that defendant violated the laws of Pennsylvania especially applicable to mining operations, which are set forth at length in the complaint. Plaintiff further pleads the Employers' Liability Act of the State of Pennsylvania and gives notice in his complaint that he relies upon that statute.

The plaintiff alleges that at all times he was and is a resident of the County of Kings and State of New York. I took proof as to this allegation in open court; I am satisfied that at the time the accident happened the plaintiff had given up his residence in New York and was a resident of Pennsylvania, but after the accident he returned to New York, and I see no reason to doubt his allegation that at the time the summons was served he was a resident of the State of New York.

The defendant alleges on this motion, and the facts are not disputed, that its principal office is in the City of Scranton, Pennsylvania; that its business is conducted in that State; that it owns no property of any kind or description in the State of New York, and that it transacts no business in this State. The defendant has no designated agent in the State of New York upon whom process might be served as provided in Section 16 of the General Corporation Law of this State, and it challenges the jurisdiction of this Court, alleging that the service upon Vice-President Thorne gives the Court no jurisdiction.

Despite a long line of decisions in which the Courts of this State have retained jurisdiction of foreign corporations, where service of the summons was actually made upon an officer of the foreign corporation within the State of New York, notwithstanding a contrary rule in the Federal Courts, I

understand that the Courts of this State have recently endeavored to end this clash of authority. In *Grant* vs. *Cananea Copper Company*, 117 App. Div., 577, Mr. Justice Clarke, writing for the Appellate Division in the First Department, reviews the decisions in the Federal and State Courts on the subject and concludes as follows, at page 581:

> "That the respondent in the matter at bar admits that a Federal question is involved, as indeed is clearly the case (U. S. Const., 14th Amend., §1). It has been raised in the proper manner by a special appearance solely for the purpose of moving to set aside the service of the summons. A Federal question being thus raised, we are bound to follow the decisions of the Supreme Court of the United States, even if they are in direct opposition to decisions of the Court of Appeals, which would otherwise be controlling. * * * It follows, therefore, that the Cananea Copper Company has not been properly brought into court by the service of a summons upon its president, said president not being in this State as the representative of said company, which does no business and has no property herein."

While the decision of the Appellate Division cited as reversed in the Court of Appeals (*Grant* vs. *Cananea Copper Co.*, 189 N. Y., 241), it was because that Court determined upon the facts before it that the defendant Copper Company was doing business in the State of New York within the meaning of Section 1780, Code of Civil Procedure, regulating actions against foreign corporations. The Court of Appeals does not dissent from the

conclusion of the Appellate Division that a Federal question is involved, or as to the propriety of following the decision of the Federal Court, Judge Haight says, in his opinion, referring to the diverse view of the State and Federal Courts upon the subject:

> "While we regret the difference in the view of the two courts, we recognize the fact that arguments may be presented in support of either position. * * * While we entertain the view that our statute upon the subject furnishes the safer and wiser rule to follow, we shall, in this case, recognize and attempt to follow the rule laid down by the Federal Court."

The opinion then points out that the president of the Copper Company, served with summons in that case, was also president of other corporations organized and doing business in the State of New York, and which, in fact, represented the defendant foreign corporation and were conducting business which "included the management and control of the business of the Cananea Company."

In the case at bar no such issue is presented. The defendant Lackawanna Coal Company transacts no business in this State and while its vice-president lives in New York, he in no way represents the company in this State.

The precise question before the Court on this motion has been recently decided by the Supreme Court of the United States in *Riverside, &c. Cotton Mills*, plaintiff-in-error, against *Menefee* (No. 169, October Term, 1914; Advance Sheets, April 12, 1915). The facts there are exactly as in the case

at bar. The plaintiff-in-error was a Virginia corporation and was sued in North Carolina by a resident of the latter State, for damages for personal injuries sustained in Virginia. The summons was served upon an officer of the Virginia corporation who was a resident of North Carolina. The plaintiff-in-error moved to set aside the service of the summons upon the same grounds as in the case at bar. Chief Justice White reviews the entire subject and the various decisions of the courts, holding that the service is absolutely void. That a judgment based upon such service was without jurisdiction "even although by implied reservation its effect was limited to the confines of the State." He says, "Without restating the St. Clair case (*St. Clair* vs. *Cox*, 106 U. S., 350), or the leading cases which have followed and applied it, we content ourselves with saying that it results from them that it is indubitably established that the courts of one State may not, without violating the due process clause of the Fourteenth Amendment, render a judgment against a corporation organized under the laws of another State, when such corporation has not come into such State for the purpose of doing business therein, or has done no business therein or has no property therein, or has no qualified agent therein upon whom process may be served; and that the mere fact that an officer of a corporation may temporarily be in the State, or even permanently reside therein, if not there for the purpose of transacting business for the corporation, or vested with authority by the corporation to transact business in such State, affords no basis for acquiring jurisdiction or escaping the denial of due process under the Fourteenth Amendment which would result from decreeing against

the corporation upon a service had upon such an officer under such circumstances." The Chief Justice says that the decisions rest "upon the basis that not the character of the residence, but the character and power of the one served as an agent of the corporation, was the test of the right to acquire jurisdiction."

If the decision of this motion involves a Federal question it would appear that this most recent decision of the Federal Supreme Court is decisive. It is evident that the Court does not regard as of moment the fact that the person served is an officer of the foreign corporation, or that he may be under moral or ethical obligations to notify his company of the service upon him. The holding seems to be clear that the officer does not carry the corporation about with him for the purpose of giving the foreign state jurisdiction, and that judgment entered upon such service is a nullity. In the case cited the North Carolina Court, having denied the application to set aside the service, the case was tried, a verdict was recovered, affirmed in the Supreme Court of the state, and the entire proceeding was declared of no avail. It would appear to be a useless waste of time and labor for the Court and the litigants to allow the case at bar to follow the same course. In this case there is no claim that the defendant is in any way, shape or form, within the exceptions which led to the reversal in *Grant* vs. *Cananea Copper Co.* (*supra*).

The motion to set aside the service of the summons and complaint must be granted.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FRANK TAKACS,
Plaintiff,

vs.

PHILADELPHIA & READING RAILWAY COMPANY,
Defendant.

PIERRE M. BROWN, of New York City, for the motion.

LEON SANDERS, of New York City, opposed.

The plaintiff alleges that at the time of the commencement of this action he was and still is a resident of the State of New York, Southern District of New York, and that on June 30, 1914, at Port Reading, in the State of New Jersey, he was injured through the fault of defendant. He now asks for judgment for the damages suffered by him. Defendant has moved to set aside the service of the summons and complaint herein.

It appears that the summons and complaint were served upon one George F. Baker, a director of the defendant company, within the State of New York.

As the question here presented may arise again, the facts, as bearing upon defendant's business, are fully set forth for the information of counsel interested in cases of this character. These facts, as alleged in an affidavit submitted on behalf of defendant are as follows:

"Defendant operates movable equipment for the transportation of merchandise from other states into New York. Freight cars are delivered by defendant to connecting carriers at points outside of this State, and are hauled by such connecting carriers to the place of destination in this State and thereupon returned to defendant. Defendant does not haul any of said cars in this state and receives compensation only for such portion of the transportation as is over defendant's lines.

"No part of this equipment is owned or ever was owned by defendant. Since January 5th, 1897, such equipment has been in the possession of the Central Trust Company of New York, trustee under a deed of trust from the owner thereof, with no reservation of possession to the owner, which trustee has, by lease, granted to defendant the right, personal to defendant only, to operate said equipment, upon payment of the rentals reserved in said lease, and upon the continued operation of said equipment by defendant as a railroad company.

"Coupon tickets for the transportation of passengers, good over the defendant's lines, are sold in New York, but such tickets are only sold by other carriers the transportation initiating with such other carriers, and the defendant receives compensation only for the portion of the transportation over its own lines, none of which is in New York. None of such ticket-selling agents are employees, or under the control, of this defendant.

"The case is in no wise different from that of some railroad in California, transportation

over whose lines may be effected in connection with a through ticket, purchased at the office of the Pennsylvania Railroad Company, or any other large trunk road having an office in New York.

"The defendant has agents in this state, employed to request shippers of merchandise to send freight, part of the transportation of which would be over the defendant's lines. The contracts made by said agents are forwarded to defendant's main office in Philadelphia for acceptance and approval.

"None of said soliciting agents have offices in the City of New York, nor has the defendant any office whatever for the conduct of its railroad business in the City or State of New York.

"This cause of action is in favor of an alleged resident of the State of New York, who upon information and belief is an alien and a Hungarian against the defendant which is a foreign corporation organized under and by virtue of the Laws of the State of Pennsylvania, for a tort alleged to have been committed at Port Reading, New Jersey.

"The summons and complaint herein were served upon George F. Baker at No. 2 Wall Street, New York City, on April 13, 1915. Said Baker is neither the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary of the defendant, nor is he an officer performing corresponding functions under any other name.

"The defendant has no designated agent upon whom process can be served within the State of New York, pursuant to the General Corporation Law, nor has it ever had one.

"The defendant has no property within this State, nor did this cause of action, which is transitory, being for personal injuries, arise within this State. Said George F. Baker, at the time of such service, was a director of the defendant and resided in this State; he had no connection with the business or operation of the defendant company or its railway, except that he attends directors' meetings in the State of Pennsylvania."

MAYER, District Judge:

If it be assumed (for it need not now be decided) that the defendant was doing business within the State of New York at the times referred to in the complaint (and this is doubtful), nevertheless this case clearly falls within the principle laid down in *Simon* vs. *Southern Railway Company,* 236 U. S., 115.

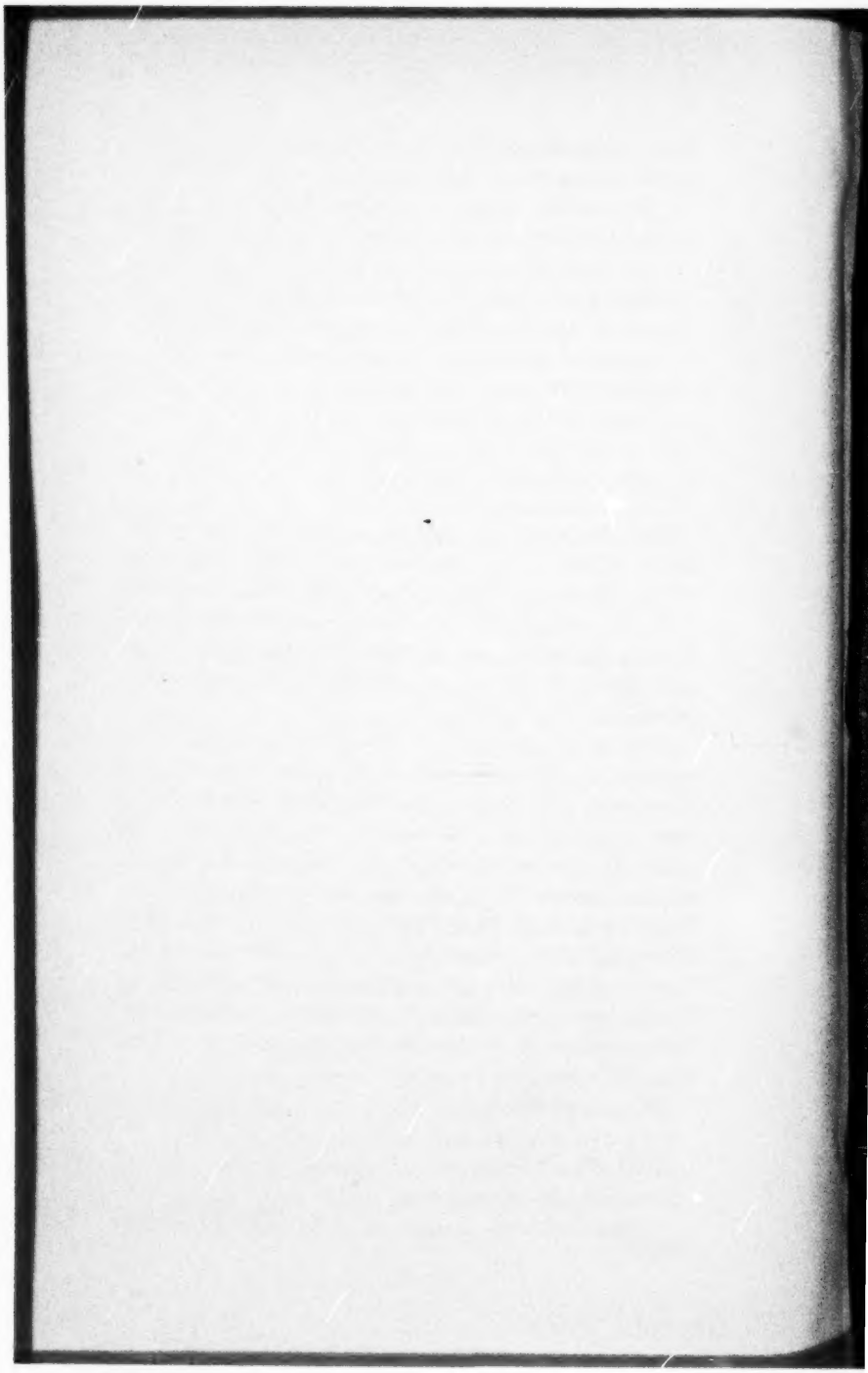
The recent opinion of Judge Learned Hand in *Smolik* vs. *Philadelphia & Reading Coal & Iron Company,* and *Tobias* vs. *The Same,* related to a case wherein the defendant had designated an agent to accept service as provided in Section 16 of the General Corporation Law of the State of New York, and in Section 432 of the New York Code of Civil Procedure. But in the case at bar the defendant has not designated any such agent. The Simon case, *supra,* in my opinion, disposes of the question so decisively that no further discussion is necessary.

Motion granted.

May 10, 1915.

District Judge.

20385



SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA & READING RAILWAY COMPANY,
Plaintiff-in-Error
(Defendant Below),
against
ROBERT J. MCKIBBIN,
Defendant-in-Error
(Plaintiff Below).

AND now comes the plaintiff-in-error, Philadelphia & Reading Railway Company, by Pierre M. Brown, solicitor, and respectfully moves the Court to advance the above cause and to take it up out of its order on the docket for argument under Rule 32.

The cause was tried and verdict rendered in favor of the plaintiff in the United States District Court, Southern District of New York. Upon the conclusion thereof the Trial Judge, Julian W. Mack, issued his certificate under Section 238 of the Judicial Code, to the effect that the question of jurisdiction of the District Court was in issue, and thereupon a writ of error was duly sued out by plaintiff-in-error and the cause is now pending in this court.

The sole question for determination is whether the District Court acquired jurisdiction over the defendant.

The cause has been docketed and is number 998 on the October Term, 1914. Notice of this motion has been given to the opposing counsel.

Dated, June 12th, 1915.

Respectfully submitted,

PIERRE M. BROWN,
Solicitor for Plaintiff-in-Error.

SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA & READING RAILWAY COMPANY,
Plaintiff-in-Error
(Defendant Below),
against
ROBERT J. MCKIBBIN,
Defendant-in-Error
(Plaintiff Below).

State of New York,
County of New York, } ss.:

Pierre M. Brown, being duly sworn, deposes and says: I am the solicitor for the plaintiff-in-error

and have charge of this case. The facts hereinafter stated are within my personal knowledge.

The cause was tried in the United States District Court, Southern District of New York, resulting in a verdict in favor of the plaintiff. The summons in the cause was served upon Theodore Voorhees, president of the company, while he was temporarily in New York and not engaged in business of the company.

At that time the plaintiff-in-error did no business in this State, except soliciting freight and sending loaded freight cars into the State over connecting carriers.

The cause of action was for a tort occurring in New Jersey, and had no relation with the business the company transacted in New York, if the foregoing acts can be held to be doing business in New York.

The plaintiff-in-error pleaded to the jurisdiction, the plea was overruled, and thereupon answered to the merits with the result as above stated.

The sole question to be determined is whether the District Court acquired jurisdiction over the plaintiff-in-error. The application to advance is made under rule 32. The defendant-in-error consents to the granting of this motion.

PIERRE M. BROWN.

Sworn to before me this
12th day of June, 1915.

T. D. ENGLISH,
Notary Public,
Kings Co. #8.
Cert. filed in N. Y. Co. #9.

CONSENT.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

No. 998.

PHILADELPHIA & READING RAILWAY COMPANY,
Plaintiff-in-Error,

vs.

ROBERT J. MCKIBBIN,
Defendant-in-Error.

The defendant-in-error hereby consents to the granting by the Supreme Court of the United States of the motion to advance the above entitled cause for argument, filed by the plaintiff-in-error in the above entitled cause.

Dated, New York, June 12, 1915.

JOSEPH A. SHAY,
Solicitor for Defendant-in-Error.

SUPREME COURT OF THE UNITED STATES.

PHILADELPHIA & READING RAILWAY COMPANY, Plaintiff-in-Error, against ROBERT J. McKIBBIN, Defendant-in-Error.	October Term, 1915. No. 475 New No. 136.

BRIEF BY PLAINTIFF-IN-ERROR IN REPLY.

POINT I.

THERE WAS NO AGREEMENT TO SUBMIT TO THE JURISDICTION OF THE STATE COURT.

Defendant-in-error asserts in his brief that the service should be sustained because it was "arranged for" by counsel for the Railroad Company.

Defendant-in-error has consistently claimed that the Railroad Company was doing business in New York and that service upon it in the State was valid, while counsel for the latter has stoutly maintained the contrary.

It is conceded by us that for the purpose of avoiding expense and trouble to defendant-in-error

in waiting and watching for the time when an officer would be in the State, the counsel for the railroad offered to give this information and this is now claimed to amount to a waiver of any criticism of the service and an agreement to submit to the jurisdiction of the New York courts.

That this is wholly unwarranted is shown by the following:

1st. Mr. Brown, counsel for the railroad, wrote to counsel for defendant-in-error on August 19th, 1914, *inter alia*—

> "He (the General Solicitor) declined to authorize me to enter an appearance" (fol. 67).

2nd. The affidavit of Mr. Brown upon this subject is found at folios 72 and 73.

> "As stated in Mr. Shay's affidavit, I had a telephone conversation with him a few days after the 1st of July, 1914. The exact date was July 7th, 1914. He asked me if I could not arrange to get an appearance for the defendant, and I told him I was not authorized to appear and the defendant would not appear. Further, that if he obtained an attachment against freight cars that had been sent into the State in interstate commerce, the attachment would not be valid, and I referred him to authorities.
>
> "Mr. Shay apparently concurred in this, but he insisted that we were, in fact, doing business in this State, because coupon tickets, good over the defendant's lines, were sold by other companies in this State, and because we sent railroad cars over connecting carriers, and that there-

fore service made upon one of the defendant's officers within this State would be valid. I told him that I could not concur with him in this, but that if he wanted to try it out, I would tell him when any of the officers of the defendant would be in this jurisdiction, and thus not subject him to the expense of hiring detectives to obtain this information.

"Pursuant to this agreement, I requested the general solicitor of the defendant to let me know when any of the officers of the defendant would pass through New York, and upon being advised that Mr. Voorhees was coming through New York from his vacation, I notified Mr. Shay.

"I had no authority to appear for the defendant, nor to make any agreement that service on one of the officers of the defendant should be regarded as equivalent to an appearance for the defendant, nor was such an agreement made; and the letters attached to the moving papers disclose that it was the consistent intention of the defendant not to appear or agree to appear."

3rd. The Court below in both instances, when the subject was before it, refused to adopt the conclusion of the defendant-in-error that plaintiff-in-error had agreed to submit to the suit in New York.

The District Court, which decided the first motion to set aside, denied it "upon the sole ground, that upon the facts stated in the affidavits, said defendant is doing business within the State of New York so as to be subject to service of process within said State," etc. (fol. 15), and reserved to

defendant the right to reassert the objection to service in its answer (fol. 15).

4th. Upon the trial the same ruling was made (fols. 45 and 46).

At folio 50 the Court said:

> "I will deny your motion upon the ground that defendant was and is doing business in New York so as to be subject to process."

POINT II.

CERTAIN STATEMENTS OF FACT IN THE BRIEF FOR DEFENDANT-IN-ERROR ARE INCORRECT.

Reference is had to the schedule of these facts appearing at pages 14, 15 and 16 of said brief:

> No. 3. Holding itself out as having an office for the transaction of business at West 23rd Street.
>
> No. 4. The Company's name printed on the door and window in said office.
>
> No. 5. Indexed in the telephone book of New York City.

The fact that Central Railroad of New Jersey, at its own expense and for the convenience of the public, does the above, is shown conclusively by the affidavits of W. C. Hope (fol. 74 et seq.) and of George F. Wernert (page 37 et seq.) and of Charles H. Gaffeney (page 39 et seq.). It may be surmised that the Pennsylvania Railroad has, upon its ticket offices, the names of railroads throughout

the United States with which it connects, but this surely does not make a Colorado railroad doing business here.

No. 6. "The plaintiff-in-error has two subsidiary companies which tow its cars from points in New Jersey to New York."

The basis for this statement of fact in the brief is referred to as folio 71, page 31, which is the affidavit of a clerk and process server in the office of counsel for defendant-in-error, and reads as follows:

"The telephone directories give the name of the Philadelphia & Reading Coal and Iron Co., 143 Liberty Street, this city, Telephone Number 5672 Cortlandt, and the Philadelphia & Reading Trans. Line, Towing Dept., same address and same telephone number. I am informed and believe that these are the subsidiary companies of the same Company, and that they tow the cars of said Company from the Jersey points to the City of New York" (fol. 71, page 31).

This statement, upon information and belief, without disclosing the slightest fact or circumstance from which his conclusion is drawn and made by a person, whose position is such that he could not have knowledge of matters he deposes to, is utterly valueless and in the face of the direct denial in the affidavits of Brown (fol. 57) and of Barrett (fol. 55) ought not to be considered.

If these *conclusions* of the writer of the brief for defendant-in-error and those contained in the

affidavits used in his behalf are eliminated and search is made for the actual facts set forth in said affidavits, they will be found to be as follows, and all of them are admitted by plaintiff-in-error. They are all contained in the affidavit of Hopton, the clerk and process server for counsel for defendant-in-error (pages 30 and 31):

1st. Defendant's cars found upon the New York Central tracks in New York.

2nd. Defendant's name in the telephone directory and upon a window in an office at the foot of West 23rd Street, and where tickets may be bought good over the railroad of the plaintiff-in-error.

With the exception of the name on the office window and in the telephone directory, these facts were set forth in the affidavits used by plaintiff-in-error. Even if the plaintiff-in-error maintained a passenger or freight solicitor and his office, it would not be doing business in New York.

Green vs. Chicago, Burlington, etc., 205 U. S., 530.

These facts may, in a sense, be considered as doing business, but as stated in Barrett's affidavit, they did not amount to doing it as a common carrier by railroad (fol. 55).

Where the facts are conceded, the question of whether they amount to doing business so as to subject the corporation to the jurisdiction of the local courts is one of law.

After the decision of Judge Mayer in the case at bar was handed down, this Court decided the case

of *Simon* vs. *Southern Railway Company*, 236 U. S., 115, and thereafter the same question came up before the same Judge, and on May 10th, 1915, he handed down the opinion attached to the brief for plaintiff-in-error.

Since the main brief herein was prepared, the case has been reported and is found at 228 Fed., 728.

The opinion sets forth the facts as to the business done by plaintiff-in-error very fully and holds that it is doubtful if this constitutes "doing business," but that in any event the case falls squarely within the Simon cases, the service was held invalid.

Reference is made in the opposing brief to the case of *Reilly* vs. *Philadelphia & Reading R. R. Co.*, 109 Fed. Rep., 349. This case was decided in 1901 and the brief fails to mention that it was a suit in admiralty in personam, which may be brought wherever service can be made. So held In re Louisville Underwriters, 134 U. S., 488.

It is stated in the brief for defendant-in-error with respect to the Reilly case:

> "I appreciate that the facts stated in the opinion about to be quoted may not be legal evidence in this case in the strictest sense of the terms, but inasmuch as the issue of good faith is interwoven here, it seems not improper that the case be mentioned."

This apology is a sham. The quotation itself is valueless, except to show the fact that fifteen years ago this Company owned a lease of sixty-two barges, tugs and canal boats engaged in towing on the Sound.

If this had been asserted in the record, we could have presented the facts as they *now* exist, but we cannot without falling into the same error of presenting matters not in the record now before the Court. And it may be suggested that counsel might well have continued the quotation from the opinion as follows:

> "The defendant in transacting the business of hiring the libellant's vessel within this district, thereby assented to service of process, in accordance with the State law, *at least in respect to such business*" (109 Fed., at page 352).

There are two other statements of fact in the opposing brief that should be called to the Court's attention.

1st. At page 31:

> "3d. That the President declared at the time that he was authorized to receive and accept service."

The authority for this statement is found in the affidavit of Leichtentritt, who served the summons upon the President of the Company as follows (fol. 63):

> "I saw a man who said he was Mr. Theodore Voorhees. I asked him if he was an officer of the Philadelphia & Reading Railway Company and authorized to accept service. He said that he was."

In the face of the repeated refusals of this defendant to appear, the above double admission can

hardly be construed as an agreement to be sued in New York.

2nd. At page 31, brief for defendant-in-error:

> "Fifth: To annul the service at this time and deny the jurisdiction of the Trial Court would permit the railroad company to profit by its own fraud inasmuch as the statute of limitations has now run against the cause of action."

The object of this is perfectly obvious. But it is stated as a fact, and it is untrue and we feel we have the right to deny it in this brief because on the face of the record the action *would* be outlawed.

An action brought in time is now pending in the U. S. District Court for New Jersey, where the cause of action arose and the suit properly belongs.

In conclusion we submit:

Upon the record this defendant is doing no more in New York than are probably the great majority of railroad companies in this country and Canada and even abroad.

That it has been authoritatively established by this Court that the acts done do not constitute business.

That the cause of action arose in New Jersey and was in no wise concerned with the business defendant does do in the State.

THE JUDGMENT SHOULD BE REVERSED AND THE CAUSE DISMISSED.

Respectfully submitted,

PIERRE M. BROWN,
Counsel for Plaintiff-in-Error.

22332.

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JAMES D. MAHE
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IN THE

Supreme Court of the United States

OCTOBER TERM—A. D. 1915.

[redacted]

(No. Number 136—October Term, 1916.)

PHILADELPHIA & READING RAILWAY COMPANY,
Plaintiff-in-Error.
(Defendant below)

against

ROBERT J. McKIBBIN,
Defendant-in-Error,
(Plaintiff below).

BRIEF FOR DEFENDANT-IN-ERROR.

JOSEPH A. SHAY,
Counsel for Defendant-in-Error.

L. B. McKELVEY,
of Counsel.

Press of Finnegan Printing Co., Inquirer Building, Philadelphia.

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Argued by
JOSEPH A. SHAY.

Supreme Court of the United States

PHILADELPHIA & READING RAILWAY COMPANY,
Plaintiff-in-Error,
(Defendant below)

against

ROBERT J. MCKIBBIN,
Defendant-in-Error,
(Plaintiff below).

THE GENERAL NATURE OF THE CONTROVERSY.

The defendant-in-error has recovered a judgment of $25,000 in an action for personal injuries, which was tried in the District Court for the Southern District of New York before Judge Mack and a jury. The case comes here by direct appeal, through the medium of a writ of error, and certificate under Section 238 of the Judicial Code.

Stated in briefest form, the sole ground upon which the assignments of error are predicated is the claim that the service of the summons was invalid because the plaintiff-in-error, being a foreign corporation, was not at the time doing business within

the State of New York, so as to be subject to the service of process in that jurisdiction. The merits of the case are not in dispute, and nothing is urged against the substantial right and justice of the award made by the jury as compensation for the very serious injuries sustained by claimant.

The summons was served upon Mr. Theodore Voorhees, the President of the defendant railroad company, at the Vanderbilt Hotel in the City of New York, pursuant to an express or implied arrangement between counsel for the parties; and the court below has found that at the time of such service the plaintiff-in-error was doing business within the State of New York, so as to be subject to process in that jurisdiction, and the defendant-in-error was a bona fide resident of that state and entitled to prosecute his action there (fol. 50, page 20, fol. 51, page 21). In the assignments of error the former of these two propositions is questioned (fol. 41, page 18).

In the trial Court the jurisdictional issue was decided solely upon affidavits. It first came before Judge Mayer on motion to vacate, and was resolved adversely to the plaintiff-in-error, with leave to plead over and raise the issue by answer. In Judge Mayer's order it is expressly found:

> "That upon the facts stated in the affidavits "said defendant is doing business within the "State of New York, so as to be subject to "service of process within said state" (fol. 15, page 8).

The plaintiff-in-error then answered, raising the question of jurisdiction by special plea in bar (fol. 20, page 10); and later a stipulation was entered

into between the parties, which reads, so far as material:

> "Upon the trial of this action, all affidavits "read by either party be recited in said order "as resettled may be read in evidence, and shall "be the only evidence offered as to defendant "doing business in said state, or as to the "validity of the service of the summons herein" (fol. 17, page 9).

When the case came on for trial before Judge Mack the course agreed upon in the foregoing stipulation was followed, and the same affidavits which had been theretofore passed upon by Judge Mayer were submitted as the only evidence in the case which concerned the issue of jurisdiction. Upon this evidence the learned trial court denied the motion of the plaintiff-in-error for a dismissal, saying:

> "I will deny your motion upon the ground "that defendant was, and is, doing business in "New York so as to be subject to process" (fol. 50, page 20).

So far as the record discloses, both parties were content that the question should be decided by the Court without submission to the jury; for while it is indicated at page 21 that the Court did call upon the jury for a special finding upon the question of plaintiff's residence at the time of the commencement of the action, yet there is nothing to suggest that either party desired the jury to pass upon the facts involved in the jurisdictional issue. A verdict of $32,500 was reduced by consent to $25,000 and

defendant's motion to set aside was denied (fol. 51, page 21).

We therefore have it twice decided in the court below, by the District Judges who have passed upon the affidavits contained in the record, that upon all the facts, and the inferences reasonably deducible therefrom, the plaintiff-in-error was, at the time of the commencement of the action, doing business within the State of New York so as to be subject to process in that jurisdiction. This is probably a mixed question of law and fact, but it will be argued in later pages of the brief that in so far as the decision of the Trial Court may be deemed a finding of fact, it is entitled here to that presumption in its favor which is the familiar rule of such an appeal.

The legal principles which support the decision will be discussed quite fully in a separate point; but it is necessary to the correct application of those principles that the more essential facts be summarized in convenient form at the outset. We therefore invite the attention of the Court to

The facts of the case in so far as they relate to the question of jurisdiction.

These facts are extremely simple and may be gleaned from a few very brief affidavits, the more essential features of which are these:

FIRST.—The service of the summons was made in the utmost good faith, pursuant to an arrangement of counsel, by which the plaintiff-in-error avoided the inconvenience and expense of threatened attachment proceedings; and the highest officer of the corporation accepted and received the process without question.

The chain of events begins with a letter from the attorney for the claimant, who, being desirous of instituting an action against the Philadelphia & Reading Railway Company, wrote to that corporation on June 30, 1914, as follows:

"June 30th, 1914.

Philadelphia & Reading Railway Co.,
Philadelphia, Pa., Law Dept.

Gentlemen:

I desire to commence an action against your railroad.

Will you kindly designate some person upon whom process can be served, or instruct your New York attorneys to accept service?

I suppose you will do this in preference to attachment proceedings which will have to be commenced.

I understand you have much property in this State such as railroad tickets, boats, etc., and I wish to avoid any inconvenience which such proceedings would entail.

Awaiting your reply, I beg to remain,

Yours very truly,

(signed) JOSEPH A. SHAY."

(Fol. 64, page 27.)

The plaintiff-in-error referred this letter to its legal department, whose General Solicitor replied under date of July 1st, 1914, as follows:

"Philadelphia & Reading Railway
Company, Legal Department,
Reading Terminal, Philadelphia.

Charles Heebner, General Solicitor,
Wm. L. Kinter, Ass't. General Solicitor,

1st July, 1914.

Joseph A. Shay, Esq.,
50 Broad Street,
New York City.

Dear Sir:

I have this morning your letter of yesterday, addressed to the Philadelphia & Reading Railway Company regarding service of process in a suit which you are about to begin against our Company, on behalf of one of your clients.

I have handed your letter to our New York Counsel, Messrs. Armstrong & Brown, 27 Cedar Street.

Yours very truly,

General Solicitor."
CHAS. HEEBNER,

(Fol. 65, page 28.)

Two or three days later there was a telephone conference between Mr. Shay, the attorney for the claimant, and Mr. Brown, one of the New York counsel of the railroad, in which Mr. Brown, upon being requested to accept service, replied that he could not do so,

"But that as soon as Mr. Voorhees, the president of the company, was coming over to New York he *would let me know so that I could*

cause service to be made upon him" (Mr. Shay's affidavit, fol. 60, page 26).

Nothing further occurred until August 10th, when the attorney for the defendant-in-error wrote Mr. Brown this letter:

"August 10th, 1914.

Mc Kibbin vs. Philadelphia & R. R. Co.

P. M. Brown, Esq.,
27Cedar Street, New York City.

Dear Pierre:

Has your president come over to town as yet? *When can I make service?* Why don't you give me an appearance? It will be easier.

Yours very truly,

(signed) JOSEPH A. SHAY."

(Fol. 66, page 28.)

Mr. Brown, one of the New York Counsel for the railroad company, replied to this letter under date of August 19th, as follows:

"August 19th, 1914.

McKibbin vs. P. & R. Ry. Co.

Joseph A. Shay, Esq.,
50 Broad Street, City.

My dear Mr. Shay:

I wrote again to the General Solicitor and he told me that Voorhees had not been in town since you originally wrote the company, but

that he would be here shortly. He declined to authorize me to enter an appearance.

I will notify you as soon as he comes.

Yours very truly,

ARMSTRONG & BROWN
(signed) PIERRE M. BROWN."

(Fol. 67, page 29.)

And on August 21st, counsel for the plaintiff-in-error fulfilled his promise by advising the attorney for the defendant-in-error in the form of a further letter as follows:

"August 21st, 1916.

Joseph A. Shay, Esq.,
50 Broad Street,
City.

Dear Sir:

Mr. Theodore Voorhees will be here in New York at the Vanderbilt Hotel Thursday next, the 27th inst. He will dine there and spend the night.

Yours very truly,

(signed) ARMSTRONG & BROWN,
PIERRE M. BROWN."

(Fol. 68, page 29.)

Pursuant to this information, a process server went to the Vanderbilt Hotel, notified Mr. Voorhees by telephone who he was, and his business, was courteously received and the service made.

Upon this subject the affidavit of the process server does not appear to be disputed in the record, and it is important enough to merit at least a brief quotation:

> "At 6 P. M. I telephoned the Vanderbilt "Hotel and asked whether Mr. Voorhees was "there and I spoke to a person who said he "was Mr. Voorhees. I asked whether or not "I could call upon him, stating that I was "from Mr. Shay's office and that I had a paper "to serve upon him, in his official capacity as "an officer of the defendant. I also told him "that I believed he knew about such service. "He told me that I could come over directly, "which I did. At about 6:15 P. M. I called at "the Hotel Vanderbilt and asked to see Mr. "Voorhees. The Clerk telephoned to his room, "giving him my name and stating that I was "from Mr. Shay's office with reference to the "McKibbin case, and I was asked to step to "Mr. Voorhees' room, which I did. I saw a "man who said he was Theodore Voorhees. *I "asked him if he was an officer of the Phila- "delphia & Reading Railway Company and "authorized to accept service. He said that "he was, and I told him that I had a summons "and complaint to serve upon him. Mr. Voor- "hees took the summons and complaint, opened "it and looked at it and said, 'Oh, this is the "'McKibbon case,' to which I replied, 'Yes, "'sir.' He then said, 'Oh, yes, I know about "'this'"* (fol. 63, page 27). (Italics Ours.)

Then the attorney for the defendant-in-error wrote the counsel for the railroad company one further letter which reads as follows:

"Attention of Mr. Brown.

September 4th, 1914.

Armstrong & Brown, Esqs.,
27 Cedar Street,
New York City.

My dear Brown:

I meant to acknowledge yours of the 19th and the 21st ult. *Pursuant to your arrangement for the service of the summons and complaint in this action, I beg to advise that Mr. Voorhees, defendant's president, was served at the time and place designated by you and they were undoubtedly turned over to you.* Mr. Voorhees remembered the case.

I shall be glad to get your answer so that the case may be noticed for the October Term of the court.

Thanking you for your courtesy in arranging service, I beg to remain.

Yours very truly,

(signed) JOSEPH A. SHAY."

(Fol. 69, page 30.)

The service having been made on August 27th, 1914, the defendant's time to answer expired on the 16th day of September, 1914; and it was on this very last day, and not before, that the plaintiff-in error saw fit to question the validity of the service by obtaining an order to show cause why it should not be set aside (fol. 61, page 26).

Regardless of anything else, therefore, it undoubtedly appears in this record that the service in

question was made pursuant to a friendly understanding between the counsel for the respective parties, and in a manner which promoted their mutual advantage. The defendant-in-error secured a service without expense, and the plaintiff-in-error, by accepting that method of service, avoided the embarrassment of a threatened attachment proceeding.

Moreover, it appears that the arrangement between counsel was sanctioned and approved by the railroad company, which had referred the matter to its New York attorneys in the first instance, and whose president, at the time of the service, declared that he knew about the case, and was *"authorized to accept service"* (fol. 63, page 27).

The situation thus developed by the practically undisputed evidence, compels us to pause in this statement of fact to indulge in the observation that the position assumed by the plaintiff-in-error is unconscionable in the extreme; and although I hold counsel on the other side in too high esteem to impugn their personal motives, I still assert that, in so far as the plaintiff-in-error is concerned, the entire transaction savors of bad faith, and appears very much like an attempt to defeat by legal fraud a poor working man who has been the unfortunate victim of serious accident while in its service. Somewhere there must be a principle of the law to prevent the success of this scheme, and it matters not by what legal term it may be called —whether it be estoppel or something else; for after all the law looks to the substance and not the form of things, and that which is right and fair and decent very often prevails in these latter days, when so much is being urged against useless technicalities, and worn-out legal forms and phrases.

SECOND.—The arrangement for service was authorized and approved by plaintiff-in-error.

It will bear repetition that when the counsel for the claimant first wrote the railroad company threatening attachment and asking that it accept service, he was notified that his letter had been referred to its New York counsel, Messrs. Armstrong & Brown. The natural inference from this suggestion was that he might safely transact with those chosen legal representatives such legal business as might relate to the proposition which he had made the company; and in acting upon this inference he did no more than would any lawyer of experience and conservative judgment.

And later, when one of those legal counsel, selected by the railroad company, had arranged for a convenient time and place when the service might be made upon its president, that highest officer of the corporation declared that he was authorized to receive and accept the same; and said of the case, "Oh, yes, I know about this" (fol. 63, page 27).

To permit that corporation to disavow the act of its chosen counsel and the representations of its highest officers would be as unfair as it would be unjust; for this is a far different and stronger case than any of those to which the plaintiff-in-error refers in its brief, where, very often, the service was obtained by trick and device, and on behalf of a claimant whose residence in the jurisdiction was merely colorable.

THIRD.—The plaintiff-in-error was, in fact and in law, doing business within the State of New York.

The facts which relate to this, the crucial test of the controversy, must necessarily be discussed in some detail in the point of the brief which is to follow immediately. For that reason they are omitted here, and the defendant-in-error proceeds at once to the discussion of those propositions of law which are involved in the appeal.

POINTS.

I.

The plaintiff-in-error was doing business within the State of New York so as to render it subject to the service of process in that jurisdiction.

This is a mixed question of law and fact, twice decided by the judges of the District Court in favor of the exercise of jurisdiction. In its legal aspect it is perhaps open to discussion here, but in so far as it partakes of the nature of an issue of fact, the decision of the trial court has something of the element of finality. For the rule seems to be well established that on such an appeal the Court will analyze the facts of a given case only so far as may be necessary to determine whether there has or has not been a denial of any of the privileges and immunities granted by the Constitution and the statutes of the United States, specially set up and claimed in the pleadings.

Southern Pacific vs. Schuyler, 227 U. S., 601, 611.

North Carolina vs. Zachary, 232 U. S., 259.

Kansas City vs. Albers, 223 U. S., 573.

Cedar Rapids vs. Cedar Rapids, 223 U. S., 655, 668.

Creswill vs. Knights of Pythias, 225 U. S., 246.

The affidavits very conclusively establish:

(1) The defendant-in-error is a bona fide resident of the State of New York. The special finding of the jury to this effect (fol. 51, page 21) is not questioned in the assignments of error (fol. 41, page 18).

(2) The plaintiff-in-error is a railroad corporation, incorporated under the laws of Pennsylvania, whose freight cars came within the State of New York (fol. 70, page 30).

(3) The plaintiff-in-error holds itself out to the public as possessing and maintaining an office for the transaction of its business at West 23rd Street in the City of New York (fol. 70, page 30).

(4) Over the door of that office is a sign which bears the corporate name of the plaintiff-in-error (fol. 71, page 31); and in that office there is a window, over which window there is another sign which bears the name of the railroad company (fol. 71, page 31).

(5) This office is indexed in the telephone directory of the city as the office of the plaintiff-in-error; and in this office the

clerks state to the public that it is the office of the railroad company and tickets are for sale there over its lines (fol. 71, page 31).

(6) The plaintiff-in-error has two subsidiary companies which tow its cars from points in the City of New Jersey to the City of New York (fol. 71, page 31).

(7) Freight cars of the railroad company are seen within the State of New York (fol. 70, page 30); and it is admitted in the opposing affidavits that its freight cars loaded with merchandise are sent over connecting carriers for delivery in the State of New York, the plaintiff-in-error receiving a portion of the compensation derived from the business (fol. 56, page 23).

(8) Coupon tickets for the transportation of passengers, good over the lines of the plaintiff-in-error, are sold in the City of New York, the plaintiff-in-error receiving a portion of the compensation (fol. 56).

(9) Undoubtedly there was some kind of a traffic arrangement with the Central Railroad of New Jersey; and although the facts are not fully stated in the affidavits submitted by the plaintiff-in-error, it is very significant that Mr. Theodore Voorhees, its president, does not deny that the corporation does business in the State of New York, simply contenting himself with the assertion

that at the time of the service he was not in the city for the business of the company; while Mr. Lawrence J. Barrett the shipping and freight agent asserts that, "*As a common carrier by railroad* the defendant does no business in the state," omitting any reference to other forms of business (fols. 54, 55, pages 22, 23).

(10) When the attorney for the claimant wrote to the general office of the railroad company stating specifically that it had property within the state which was subject to attachment, there was no denial of the fact in the subsequent correspondence (fol. 64, page 27); and when the president of the company was served with process he stated that he was authorized to accept the same (fol. 63, page 27).

(11) In the answering or opposing affidavits the facts hereinabove given, concerning the form and method of the maintaining of offices and telephones, the sale of tickets and the presence of some kind of a traffic arrangement with the Central Railroad of New Jersey, are none of them denied; while at all points it is conceded that these things were at least partially for the benefit of the plaintiff-in-error, and resulted in its pecuniary advantage and profit.

In the consideration of these important facts, which seem very plainly to fix the status of the

plaintiff-in-error, it is interesting to note a recent decision upon the same subject, in which the affairs of this railroad company were considered in relation to the very question now before the court. I appreciate that the facts stated in the opinion about to be quoted may not be legal evidence in this case, in the strictest sense of the term; but inasmuch as the issue of good faith is interwoven here, it seems not improper that the case be mentioned. I refer to Reilly vs. Philadelphia & Reading R. R. Co. (109 Fed. Rep., 349), in which the court mentioned these very significant and pertinent facts:

> "Under the recent reorganization of the de-
> "fendant's company, a very large amount of
> "property of the defendant was conveyed to
> "the Central Trust Company of New York as
> "trustee, by which the same property was
> "leased to the defendant in February, 1897, for
> "49 years at an annual rental of $1,472,000
> "besides the obligation to keep the property in
> "repair and replace such as should be lost, or
> "destroyed by wreck or otherwise. In this
> "lease is included, under the head of 'Floating
> "'Equipment,' subdivision 'New York Equip-
> "'ment,' various sound barges, tugs, and canal
> "boats, amounting in all to 62 named boats,
> "valued at $46,450. *Although this 'New York*
> *"'Equipment' is not owned by the defendant,*
> *"I do not see how so extensive a leasehold*
> *"right can be denied to be a property interest."*
> (Italics ours.)

With these very stubborn facts thus developed, I turn now to the general rule by which their legal

effect is to be determined, a rule which, in a sense, makes each case a law unto itself, to be tested by its own peculiar facts, as distinguished from any all-embracing standard. It is as well stated as anywhere in St. Louis R. R. Co. vs. Alexander (227 U. S., 226), in these words:

> "This court has decided each case of this "character upon the facts brought before it, "and has laid down no all-embracing rule by "which it may be determined what constitutes "the doing of business by a foreign corpora- "tion in such manner as to subject it to a given "jurisdiction. In a general way it may be "said that the business must be such in char- "acter and extent as to warrant the inference "that the corporation has subjected itself to "the jurisdiction and laws of the district in "which it is served, and in which it is bound "to appear when a proper agent has been "served with process. Lafayette vs. French, "18 How., 404; Green vs. Chicago, B. & Q. Ry. "Co., 205 U. S., 532."

Surely the facts of the case at bar warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it was served, as those terms are used in the opinion cited; and beyond any question the facts established, and the inferences reasonably deducible therefrom, were such as to warrant the learned trial court in the determination which it has made of the important question of jurisdiction. It is only out of greater caution, and because of the vital importance of the issue to this unfortunate claimant, that we proceed to discuss the further case law upon the subject.

In the first place it is interesting to note, as a basic proposition, that if this were an action brought in the state courts of New York, with no distinctively federal question involved, there could be not the least of question as to the validity and sufficiency of the service.

Pope vs. Terre Haute, 87 N. Y., 137-139.
Hiller vs. Burlington R. R. Co., 70 N. Y., 223.
Grant vs. Cananea Copper Co., 117 App. Div., 576-577.

These New York decisions are based upon Sections 1780 and 432 of the Code of Civil Procedure, the first of which reads thus:

> "An action against a foreign corporation "may be maintained by a resident of the "state, or by a domestic corporation, *for any "cause of action.* An action against a foreign "corporation may be maintained by another "foreign corporation, or by a non-resident, in "one of the following cases only:
> "(3) Where the cause of action arose with- "in the state." * * *

Section 432 provides:

> "Personal service of the summons upon a de- "fendant, being a foreign corporation, must be "made by delivering a copy thereof, within the "state, as follows: (1) to the president, vice- "president, treasurer, assistant treasurer, "secretary, or assistant secretary." * * *

In the Pope case it was decided by the courts of New York that service upon the president of a for-

eign corporation, who was temporarily within this state on his own private business, was valid. The opinion reads in part:

> "It appears that the defendant, being a "foreign corporation, had no place of business, "and transacted no business, and had no prop- "erty within this state, and that at the time "its president was served he was temporarily "within this state for purposes of his own, on "his way to a seaside resort, and not in his "official capacity or upon any business of the "defendant. The claim is, therefore, made "that he in no way represented the defendant, "and that service upon him could not bind the "defendant. * * *
>
> "The object of all service of process for the "commencement of a suit or any other legal "proceeding is to give notice to the party pro- "ceeded against, and any service which rea- "sonably accomplishes that end answers the "requirements of natural justice and funda- "mental law (Gibbs vs. Queens Ins. Co., 63 "N. Y., 114); and what service shall be "deemed sufficient for that purpose is to be "determined by the legislative power of the "country in which the proceeding is instituted, "subject only to the limitation that the service "must be such as may reasonably be expected "to give the notice aimed at."

Such being the rule of New York State, it is binding in the case at bar, with but one qualification or reservation, which is stated in St. Louis vs. Alexander (227 U. S., 326), in these words:

> "A long line of decisions in this court has "established that in order to render a corpor-

"ation amenable to service of process in a "foreign jurisdiction, *it must appear that the "corporation is transacting business in that "district to such* an extent as to subject it to "the jurisdiction and laws thereof."

See also

St. Clare vs. Cox, 106 Fed. Rep., 359.
Lumberman's Ins. Co. vs. Nugar, 192 U. S., 413.
Goldey vs. Morning News, 156 U. S., 518.
Barrows Steamship Co. vs. Kane, 170 U. S., 100.
Connecticut Mutual vs. Spratley, 172 U. S., 602.
International Text Book Co. vs. Pigg, 217 U. S., 91.
Commercial Mutual vs. Davis, 213 U. S., 255.

The principle being that

"When it (a foreign corporation) avails "itself of the privileges of doing business in a "state whose laws authorize it to be sued there "by service process upon an agent, its assent "to that mode of service is implied. Accord- "ingly, it has been repeatedly held that a for- "eign corporation consents to be amenable to "suit by such mode of service as the laws of "the state provide, when it invoked the comity "of the state for the transaction of its affairs."

Merchants' Mfg. Co. vs. Grand Trunk Ry. Co., 13 Fed. Rep., 359.

As demonstrating that the facts of the case at bar bring it clearly within these principles, the following decisions are important:

Central of Ga. Ry. vs. Eichberg, 14 L. R. A. N. S., 389.
Denver & R. G. R. R. vs. Roller, 100 Fed. Rep., 738.
Van Dresser vs. Oregon Ry. Co., 48 Fed. Rep., 202.
Sleicher vs. Pullman Co., 170 Fed. Rep., 364.
Chesapeake Ry. Co. vs. Stojanowski, 191 Fed. Rep., 92.
Union Pacific vs. Navak, 61 Fed. Rep., 579.
Block vs. Atchison Ry. Co., 21 Fed. Rep., 529.
Kirby vs. Lounsman, 221 Fed. Rep., 267.
Smolide vs. Pa. & Reading, 222 Fed. Rep., 148.

In the case first cited the Court of Appeals of Maryland dealt with a state of facts which is as near like those presented in the case at bar as any which can be found in the books. This furnishes the excuse for what would otherwise be an extremely labored quotation,

> "The facts show that, while Mortimer, the "agent upon whom the summons was served, "had no power to make contracts for the ap- "pellant, yet that by and through the agency "of the Merchants' & Miners' Transportation "Company, a domestic corporation, contracts "were made in this state for and in the name

"of the appellant, which contracts the appel-
"lant recognized and accepted as valid and
"binding upon it. The domestic corporation
"sold tickets and issued bills of lading good
"over its own line and also over the lines of the
"appellant. In the case of a passenger, the
"whole fare would be paid to the domestic cor-
"poration; and in the case of freight a through
"bill of lading would be issued and a single
"sum paid for the carriage. Mr. Mortimer was
"appointed jointly by the Merchants' & Min-
"ers' Transportation Company and its con-
"necting carrier, the Central of Georgia Rail-
"way Company, to solicit traffic for what was
"known as the 'Central Savannah Line,' which
"was the appellation for advertising purposes
"of the whole route made up principally of the
"two connecting carriers above mentioned.
"Thus, on one of the windows in the building
"occupied by the Merchants' & Miners' Trans-
"portation Company at the southeast corner of
"Light and German Streets in the City of Bal-
"timore appears the sign 'Central Savannah
" 'Line via Central of Georgia Railway and the
" 'Merchants' & Miners' Transportation Com-
" 'pany.' In this same building Mortimer has
"his office, and, as the representative of both
"these connecting carriers, is regularly en-
"gaged in the procurement of freight for trans-
"portation over some part of the entire line.
"The regular advertising folders of the appel-
"lant have inside of them the statement that
"tickets over the Central of Georgia can be
"purchased at any of the Merchants' & Miners'
"ticket offices. *All these facts and circumstan-*
"ces taken together show that the sale of

"tickets and the issuance of through bills of "lading by the domestic corporation over its "own line, and over the lines of the appellant, "were not occasional or accidental merely, but "a part of its regular, usual, and ordinary busi- "ness; and that the domestic corporation was "the recognized agent of the appellant, and, as "such, authorized to make contracts in this "state for the transportation of passengers and "freight over appellant's lines in the state of "Georgia. We must therefore hold that the "appellant was transacting business in this "state within the meaning of our statute pro- "visions on the subject. For cases more or less "analogous we cite: Denver & R. G. R. Co. vs. "Roller, 49 L. R. A., 77, C. C. A., 22, 100 Fed., "738; Van Dresser vs. Oregon R. & Nav. Co. "(C. C.), 48 Fed., 202; Merchants' Mfg. Co. vs. "Grand Trunk R. Co., 21 Blatchf., 109, 13 Fed., "358." (Italics ours.)

There is also a striking similarity between the case at bar and the facts with which the Court dealt in Denver & R. G. Co. vs. Roller (100 Fed., 738, 740). There the railroad company had an office in the City of San Francisco, upon the windows of which were signs that bore its name. In a folder used and distributed for public information the name of W. J. Shotwell was used as general agent. He made an affidavit that he was the general agent of the railroad, that in his offices at San Francisco he and his clerk solicited passengers and freight to be taken over the Denver & Rio Grande R. R. and issued shipping receipts. He claimed, however, that he was only a soliciting agent, to influence shippers to use that route. The Court decided that the

defendant was doing business at San Francisco in such a sense as to render it liable to service of process therein.

In Van Dresser vs. Oregon Ry. & Nav. Co., 48 Fed. Rep., 202, the opinion reads in part:

> "The Union Pacific Railway Company, having formed a combination under the name of "the 'Union Pacific System' with various other "companies, including the Oregon Short Line "Company, which operates a railroad in Wash-"ington, and being engaged in making con-"tracts therein for freight and passenger ser-"vice under the name for the system, must be "considered as doing business in that state, and "a service of summons upon an agent therein, "who is authorized to act for all the companies "of the system, is a service upon the corpora-"tion."

And contains also the following very pertinent suggestions:

> "It is the owner of a line of railway which "is part of the system, and engaged in oper-"ating it. *Every contract made in that name, "for a passage or for transportation of freight "over its railway, must be regarded as its con-"tract, and is binding to the same extent as if "made in its corporate name. The evidence "shows that such contracts are being made in "this state continually, for its benefit and "profit, with its knowledge and consent, and "the person upon whom the summons was "served in this case was at the time a duly-"authorized ticket and freight agent of each "and all the associated companies composing*

"*the Union Pacific System;* I hold, therefore, "that the U. P. Company is a corporation doing "business in this state, and that it should not "be allowed to repudiate the agency of the "officer through whom it is transacting busi- "ness and receiving gains." (Italics ours.)

Similar in principle also is Norton vs. Atchison, T. & R. Co., 61 Fed. Rep., the headnote of which fully describes the situation in these words:

"A foreign railroad company which runs its "trains over the tracks of other companies "forming with its 'system' or 'route' into Cali- "fornia, and there solicits and obtains freight "and passenger business through the general "manager of one of the subordinate companies "and his assistants, may be legally served by "service upon him, as the 'managing and busi- " 'ness agent' in the state (Code Civ. Proc. Cal., "Sec. 411) of such foreign company, although "it has never directly designated him as its "agent. Stout vs. Railroad Co., 8 Fed., 794, "distinguished."

In Block vs. Atchison R. Co., 21 Fed. Rep., 529, the headnote reads thus:

"Where a railroad corporation, organized "and having its roads in one State, has an "office in another for the purpose of soliciting "business, and has an agent in charge of such "office, employed for the purpose of further- "ing the business of the company in the state "in which its road runs, it may be sued in the "district where such office is located, and is to

"be considered 'found' in such district, with-
"in the meaning of Section 1 of the Act of
"March 3, 1875, concerning the jurisdiction of
"circuit courts."

In another portion of the opinion the court says:

"But, in this case, this corporation defend-
"ant has established a business office here, and
"has an agency. It does not run its railroads
"here, carry passengers, or transport freight
"within this district, but it has an office here
"for the purpose of soliciting business, and has
"an agent here,—not a sub-agent, but a direct
"agent,—employed for the purpose of further-
"ing the transportation business of the cor-
"poration in the states where its road runs;
"the same as various manufacturing and in-
"surance corporations have offices established
"in different cities for the purpose of expanding
"their business; and, wherever they have an
"office established, an agency is created. It
"seems to me that, within the purview of this
"statute, the corporation is found wherever
"such an office and agency is established."

See also,

Sleicher vs. Pullman Co., 170 Fed. Rep., 364.
Chesapeake Ry. Co. vs. Stojanowski, 191 Fed. Rep., 92.
Union Pacific vs. Navak, 61 Fed. Rep., 579.
Irons vs. Simeon, 166 Fed. Rep., 781.

Under these well considered decisions, many of them similar in fact and all identical in principle,

there would appear no escape from the conclusion that the plaintiff-in-error in the case at bar is doing business within the State of New York so as to render it subject to process therein; and the cases cited by the plaintiff-in-error, far from establishing the contrary, are to precisely the same effect.

In Green vs. Chicago, Burlington & Quincy Ry. Co. (205 U. S., 530), the proof of the defendant's operations was meagre in comparison with that shown in the case at bar. At most there was solicitation only, while in the case at bar there are many additional elements. And while this court held in the Green case that such mere solicitation was not enough, it was very careful to specify in its opinion that it was not intending thereby:

> "To formulate any general rule defining what "transaction will constitute 'doing business' "in the sense that liability to service is in-"curred."

From the tone of the opinion I am quite confident that had the additional facts which are now presented been disclosed in the record, this court would undoubtedly have upheld the jurisdiction of the trial court.

In Earl vs. Chesapeake & O. Ry. Co. (127 Fed. Rep., 235), cited by the plaintiff-in-error, the corporation maintained no office in the state nor similar place of business, nor did it have subsidiary companies, or hold itself out as doing either of these things.

In Maxwell vs. Atchison (34 Fed. Rep., 286), the opinion of the court sustains, rather than weakens, the position of the defendant-in-error here. It says:

"What is the character or amount of busi-
"ness which the corporation must do to subject
"its agent to the service of process within the
"foreign state, is left in some doubt by the
"authorities. If it have an office for the gen-
"eral transaction of its business—the sale of
"its goods, if it be a manufacturing corpora-
"tion; or the making of contracts, and the re-
"ceipt of freight and passengers for trans-
"portation, if it be a railroad—it would appear
"to be sufficient (Hayden vs. Mills, 1 Fed.
"Rep., 93; Railroad Co. vs. Harris, 12 Wall,
"65; Railroad Co. vs. Cram, 102 Ill., 249;
"Libbey vs. Hodgdom, 9 N. H., 394)."

The other cases cited by the plaintiff-in-error are in support of the second point of its brief, which will be discussed as a separate proposition here, and for that reason mention thereof will later be made.

It is respectfully submitted that in view of every authoritative decision upon the subject, and in the face of the facts established by the affidavits and found by the trial court, there can be no reasonable doubt of the proposition that this defendant was, in fact and in law, doing business within the State of New York, in precisely the sense which would render it subject to service of process within that jurisdiction.

II.

In answer to the Second Point of the Brief of the plaintiff-in-error.

The argument presented in the second point of the brief of counsel for the railroad company does

not appear to have been very seriously urged in the court below. The record fails to indicate that the point was directly made at the trial, or specified in any of the motions to dismiss, although it is true that the answer contains a formal allegation upon which such an argument might have been predicated. The crucial test of this case has until now been considered by both parties the question whether the plaintiff-in-error was, or was not, doing business in the state; and these later suggestions are very much in the nature of an afterthought, constituting still another thread in the maze of technicalities with which this very meritorious cause of action has been embarrassed by the skillful legal talent in the employ of the corporation.

They now contend, in a word, that even though plaintiff-in-error was doing business in the State of New York, that fact does not render it amenable to process in the jurisdiction in any cause of action which arose outside the State of New York; and in pretended support of this contention two or three important cases are cited. But such is not the law.

It will be remembered that in the case at bar the facts have established, or at least they have very fairly tended to establish:

> First.—That by the consent, and for the mutual advantage of the parties, the service was made at the time and place selected by counsel for the railroad.
>
> Second.—That the service was made upon the president of the company, and not upon some agent designated by a compulsory statute.

Third.—That the president declared at the time that he was authorized to receive and accept the service.

Fourth.—That there are undisturbed findings of fact here to the effect that the plaintiff-in-error was doing business in this state, and defendant-in-error was a bona fide resident thereof at the time of the commencement of the actions.

Fifth.—To annul the service at this time and deny the jurisdiction of the trial court would permit the railroad company to profit by its own fraud, inasmuch as the statute of limitations has now run against the cause of action.

No such facts as these appear in any of the decisions cited in the brief of our opponents; on the contrary it is very plainly indicated in each of them that had any such facts been presented the decision would have been in favor of sustaining the exercise of jurisdiction.

In the case of Simon vs. Southern Ry. Co. (236 U. S., 255), which is the principal authority cited by the railroad company, a foreign corporation was sued in the State Court of Louisiana, and service was made, not upon any officer of the defendant, but rather upon the Secretary of State, under a compulsory statute providing for such service, but which failed to provide for any form of notice to the defendant.

This court held, upon the special facts of the case, that such a service was insufficient to vest in the Louisiana courts jurisdiction of a cause of action arising in Alabama; but it decided nothing

against the right of a federal district court in a state of which claimant was a bona fide resident, to assume jurisdiction upon service made upon the chief officer of a corporation, by consent, and where there was no question of actual notice, good faith, and full opportunity to defend.

Old Wayne Life Association vs. McDonough (204 U. S., 22) was similar in its facts to the Simon case. There service was made upon the insurance commissioner under a compulsory statute, which gave to such service the same effect as personal service upon the company within the state. There was no actual proof that the company did business in Pennsylvania; and judgment passed by default. The Court said:

> "As the suit in the Pennsylvania court was "upon a contract executed in Indiana; as the "personal judgment in that court against the "Indiana corporation *was only upon notice to "the Insurance Commissioner, without any "legal notice to the defendant Association and "without its having appeared in person, or by "Attorney, or by agent in the suit;* and as the "act of the Pennsylvania court in rendering "the judgment must be deemed that of the "State within the meaning of the Fourteenth "Amendment, we hold that the judgment in "Pennsylvania was not entitled to the faith "and credit which, by the Constitution, is re-"quired to be given to the * * * judicial "proceedings of the several states, and was "void as wanting in due process of law." (Italics ours.)

In Riverside Co. vs. Manefee (237 U. S., 189) the ground of the decision by Chief Justice White is indicated by this quotation from his opinion:

"Without restating the St. Clair case (St. "Clair vs. Coc, 106 U. S., 350), or the leading "cases which have followed and applied it, we "content ourselves with saying that it results "from them that it is indubitably established "that the courts of one State may not, without "violating the due process clause of the Four- "teenth Amendment, render a judgment "against a corporation organized under the "laws of another state, *when such corporation "has not come into such State for the purpose "of doing business therein, or has done no "business therein or has no property therein, "or has no qualified agent therein upon whom "process may be served;* and that the mere "fact that an officer of a corporation may tem- "porarily be in the State, or even permanently "reside therein, if not there for the purpose of "transacting business for the corporation, or "vested with authority by the corporation to "transact business in such State, affords no "basis for acquiring jurisdiction or escaping "the denial of due process under the Four- "teenth Amendment which would result from "decreeing against the corporation upon a ser- "vice had upon such an officer under such cir- "cumstances." (Italics ours.)

The same radical distinction will be noted in Severn vs. Lackawanna Coal Co., quoted in full at page 14 of the brief of the plaintiff-in-error. There, referring to Grant vs. Cananea Copper Co. (189 N. Y., 241), where the jurisdiction had been upheld by our Court of Appeals, Mr. Justice Kelly proceeds:

"The opinion then points out that the pres-
"ident of the Copper Company, served with
"summons in that case, was also president of
"other corporations organized and doing busi-
"ness in the State of New York, and which, in
"fact, represented the defendant foreign cor-
"poration and were conducting business which
" 'included the management and control of
" 'the business of the Cananea Company.'

"In the case at bar no such issue is present-
"ed. The defendant Lackawanna Coal Com-
"pany transacts no business in this state and
"while its vice-president lives in New York, he
"in no way represents the company in this
"state." (Italics ours.)

In Takacs vs. Phil. & Reading Ry. Co., quoted at page 20 of the brief of the plaintiff-in-error, we find the opinion written by Judge Mayer, one of the District Judges who upheld the service in the case at bar. Needless to say there must be some plain and radical distinction between these two cases; and it is very clearly indicated, in part at least, by the fact that there the service was made upon one George Baker, a mere director, of whom it is said in the opinion,

"Said George F. Baker, at the time of such
"service, was a director of the defendant and
"resided in this state; *he had no connection*
"with the business or operation of the defend-
"ant company or its railway, except that he
"attends directors' meetings in the State of
"Pennsylvania." (Italics ours.)

III.

It is therefore respectfully submitted that the judgment of the District Court should be in all things sustained and affirmed, and the writ of error dismissed.

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OCTOBER TERM—1916, NO. 475.

New No. 136.

PHILADELPHIA & READING RAILWAY COMPANY,
Plaintiff-in-Error,
against
ROBERT J. McKIBBIN,
Defendant-in-Error.

IN ANSWER TO PLAINTIFF-IN-ERROR'S BRIEF IN REPLY.

JOSEPH A. SHAY,
Counsel for Defendant-in-Error.

L. B. McKELVEY,
of Counsel.

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Supreme Court of the United States

PHILADELPHIA & READING RAILWAY COMPANY, Plaintiff-in-error, vs. ROBERT J. MCKIBBIN, Defendant-in-error.	October Term, 1915. No. 475. New No. 136.

IN ANSWER TO THE REPLY BRIEF FILED BY THE PLAINTIFF-IN-ERROR.

POINT I.

The reply brief of the plaintiff-in-error is an interesting and instructive document, not at all because it touches upon any vital subject which had been omitted in the main argument, but rather because it serves to bring out, in bold relief, a few of the more stubborn facts which support the judgment of the District Court, and which stand wholly undenied and unexplained upon the record of this rather simple case.

That which is charged on one side of a legal controversy, and which can be denied, ought to be denied, if material to the issue; silence is very often a confession of guilt, or an admission which must

constitute proof of the greatest probative force. This is common-sense and logic, and it must therefore be the law.

With this thought in mind, I respectfully but very earnestly assert that the weak and puerile attempt of the learned counsel for the plaintiff-in-error to avoid the force of some of those facts upon which the claimant relies, which were very openly charged in the affidavits before the trial court, and which were not then denied, is plainly indicative of the entire lack of merit of this technical defense which a great railroad corporation has attempted, but thus far unsuccessfully, to interpose as a fraudulent barrier to the just claim of its unfortunate servant. To demonstrate this truth is not at all difficult.

(a.)

I respectfully invite the attention of the Court to the remarkable silence of the plaintiff-in-error upon the subject of the Philadelphia & Reading Trans. Line Towing Dept., mentioned by the affiant Clarence Hopton at folio 71, page 31 of the record, and which he declares upon information and belief to be one of two subsidiary companies of the plaintiff-in-error, through the medium of which it tows its cars from the State of New Jersey to the State of New York.

The learned counsel for the railroad would seek to destroy the force of this evidence, although in the trial court he made no attempt at denial or explanation, and not a single word of the affidavits which were then so carefully prepared touches upon this dangerous topic. Upon many other subjects the officers and employees of the various corpora-

tions affiliated with the plaintiff-in-error, are quite fluent, but upon this they are as silent as the tomb. Why?

In our main brief counsel for the defendant-in-error, predicating the charge upon the affidavit of Hopton and the mass of other facts to be found in the record, made this assertion:

> "The plaintiff-in-error has two subsidiary "companies which tow its cars from points in "New Jersey to New York."

The statement is now criticized at page 5 of the reply brief of counsel for the plaintiff-in-error as "utterly valueless," "in the face of the direct denial in the affidavits of Brown" (fol. 57) "and of Barrett" (fol. 55).

But the remarkable thing about this proposition is that there is no such "direct denial" in either of the affidavits mentioned, or in any other. Everything else is covered, but not this. Mr. Brown, in his own affidavit, says that the defendant does no business in New York State, and that he knows all about its affairs; but he omits any discussion of the Towing Department or of the subsidiary companies (fol. 57, page 34). Mr. Barrett goes quite in detail upon some other topics, but fails to mention this (fol. 56, page 23); and the president of the railroad company, who ought to be interested in the fact, contents himself with a statement of the personal business which brought him to New York at the time the papers were served upon him (fol. 54, page 22).

I take it that this peculiar situation, with this strange silence of the defendant upon such an important subject, must appeal to the judicial conscience with considerable force; for what could be

more significant? What would have been easier than for these three affiants to deny the existence and the relation of the subsidiary towing lines, if in fact they did not exist, or were wholly alien to the defendant here? And having failed to dispute the evidence of the plaintiff at the time and place when dispute was fitting and proper, by what right may counsel now assume to do so, in the closing pages of a so-called reply brief, and when the case has reached its final stage? The answer must be entirely obvious.

Nor does it matter in the least that the statement made by Mr. Hopton was upon information and belief. It was supported by facts, some of which were detailed by him, and others to be found in the additional affidavits filed. Not disputed they stand and are as useful as any other form of allegation; for a reasonable inference very often weighs as heavily in a legal equation as direct and positive proof.

I repeat, therefore, the statement contained in the main argument, to the effect that the plaintiff-in-error did indisputably transact a portion of its business as a common carrier in the State of New York through the medium of its subsidiary companies, and that it had a towing department for that purpose (fol. 71, page 31); and if there were nothing else in this case, the fact alone would support and justify the finding of the trial court, which lies at the basis of the exercise of jurisdiction.

(b.)

Counsel for the railroad discusses and criticizes this statement, which is to be found at page 31 of the brief of the defendant-in-error:

"That the President declared at the time "that he was authorized to receive and accept "service."

But the precise ground of the criticism does not appear. There is no question of the fact that the process server swore, in most positive terms, at folio 63, page 17 of the record, that at the time of the service of the summons he asked Mr. Voorhees, the President of the road, if he was an officer of the company and authorized to accept service; and that upon being answered in the affirmative, he served the summons; whereupon Mr. Voorhees exclaimed, "Oh, this is the McKibbin case, * * *. Oh, yes, I know about this."

Mr. Voorhees had the opportunity to deny this statement if it was untrue; but he did not deny it. He made an affidavit in which it was absolutely ignored; and if it be claimed that that affidavit was made before the process server's affidavit had been filed, then certainly he had plenty of opportunity thereafter to reply, if he could truthfully do so (fol. 54, page 22).

Here, again, is the same remarkable failure to deny a material fact, in a situation where silence must be construed as an admission; for if the president did not make the statement which is credited to him, what on earth would have been easier than for him to file an affidavit disputing the charge?

But counsel goes even further than this. Entirely conscious of the futility of any claim at this late date that the statement was not made by the president of the road, he proceeds to argue that even if made it could not constitute an agreement for service. It is not necessary that it be so construed.

The statement made by the president of a rail-

road company may, or may not, constitute an agreement, but the evidence of the fact that he did make such a statement surely constitutes a material element in the chain of events as the result of which this claimant contends there was an arrangement for service, acted upon by all parties, and ratified by the chief officer of the plaintiff-in-error, in so far as he had the power to ratify it; and it may well be that, in the peculiar situation here presented, this Court will hold the railroad company estopped from denying the truth of the president's statement, which has been acted upon in good faith by the defendant-in-error, and the disregard of which would now result in material injury.

(c.)

Again, the plaintiff-in-error asserts at page 3 of the reply brief that the court below

> "refused to adopt the conclusion of the defend-
> "ant-in-error that the plaintiff-in-error had
> "agreed to submit to the suit in New York."

It is entirely true that the sole ground mentioned in the decision of the trial court was that the defendant was doing business in New York State; but it is no less true that in arriving at that conclusion the court must have given much of significance to the testimony concerning the alleged arrangement for service upon which the defendant-in-error predicates the claim that a denial of jurisdiction would result in a fraud.

A threat of attachment proceedings against the property of the plaintiff-in-error in the event that it did not designate a time and place of service upon

one of its officers, followed by such designation, and the willing acceptance of the process by an officer who declared at the time that he was authorized to receive it; taken in conjunction with all the facts of the case which so very clearly disclose that the railroad company was in fact doing business in New York State and had property there which would otherwise have been subject to an attachment proceeding, undoubtedly appealed with some force to the trial judge, who must have considered it of more than passing significance that the defendant was so willing to arrange for service rather than submit to an attachment proceeding, which would long ago have finally settled the question one way or the other.

We protest, therefore, against the attempt of counsel for the plaintiff-in-error to thus eliminate this arrangement for service. It is too important an element to be passed so lightly by; and we very confidently assert that its existence must appeal with great force to any court in the determination of this very technical defense.

An arrangement of this character entered into by the parties in good faith ought to have some binding force and effect, even though, as the result of a strange afterthought, the plaintiff-in-error saw fit to violate its letter and spirit by moving to vacate the service *on the very last day to answer* (fol. 61, page 26).

(d.)

On page 9 of the brief in reply there is one criticism of defendant-in-error's main brief which is, in a measure, justified.

We had asserted that the statute of limitations has run against the cause of action. In fact it has

run against the commencement of any new action at this time; for the affidavit of Mr. Shay, at folio 59, page 25 of the record, explains that it is an action under the Federal Employers' Liability Act which must be commenced within two years after the injury.

This entirely justifies the statement, in so far as the face of the record is itself concerned, and it was from the record alone that our brief was drawn by counsel who knew none of the other facts of the situation. It is true, nevertheless, as stated in the reply brief, that an action is now pending in the State of New Jersey, which was brought, and is being kept alive only out of greater caution, and to protect this unfortunate claimant, so far as possible, against the contingency of an utter failure of justice, in the event that this defendant shall, by any hook or crook, succeed in its very unjust and fraudulent attempt to set aside the present judgment, against the substantial merit and justice of which not a single word is written.

All of the other matters touched upon in the reply brief have been discussed at great length in the main argument, and it is therefore considered neither fitting nor proper that they should be repeated here.

It is respectfully submitted that the judgment of the District Court should be in all things affirmed.

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